UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** to Dismiss Charge I For Failure to State an Element of the Offenses in Violation of Due Process 11 July 2008

1. **Timeliness:** This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the Military Judge's 19 June 2008 scheduling order.

2. **Relief Requested:** The defense requests that this Commission dismiss Charge I, alleging "Murder in Violation of the Law of War."

3. **Overview:**

a. Due process requires that a criminal charge allege each element of the offense, so that the defendant has fair notice of what burden the government must meet at trial. In light of the Supreme Court's decision in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), there is no longer any doubt that such a basic Fifth Amendment due process requirement controls the conduct of this Military Commission. Indeed, the government has a heightened burden to specify charges with particularity when an element of the offense alleges a violation of some customary law. It is not sufficient for the government to allege that a custom was breached, but it must specify which custom and how.

b. The specification of Charge I against Mr. Khadr merely alleges that he took part in a conventional battle, during which he used a conventional weapon (a hand grenade) in response to a conventional assault by U.S. forces. It alleges that he did this unlawfully, by doing so without combatant immunity, and that he did this in violation of the law of war. While this does recite the elements provided in the MCA, that a killing be done both unlawfully and in violation of the law of war, it does not make clear how Mr. Khadr's conduct violated an extant law of war. In fact, in response to a motion to dismiss, trial counsel articulated two distinct theories on this element, by alleging that Mr. Khadr either committed the war crime of "Unprivileged Belligerency" and/or "Perfidy."

c. In its ruling on that motion, the military judge simply ruled that Murder in Violation of the Law of War is a triable offense under the MCA. It did not specify under which theory the government had demonstrated the necessary elements. Now that due process guarantees of fair notice unequivocally apply, defense counsel moves for the dismissal of Charge I because the specification does not apprise Mr. Khadr of the elements the government must prove at trial. Accordingly, Charge I should be dismissed. If the government wishes to prosecute Mr. Khadr for Murder in Violation of the Law of War, then it must prefer a new charge that clearly states how Mr. Khadr breached an existing law of war in satisfaction of all the necessary elements of the crime.

4. **Burdens of Proof and Persuasion:** Because this motion is jurisdictional in nature, the Government bears the burden of proving jurisdiction by a preponderance of the evidence. *See* Rule for Military Commissions (R.M.C.) 905(c)(2)(B).

5. **Facts:**

a. According to a memorandum prepared by the on-scene commander, U.S. forces mounted a lawful assault on an approximately 37x27 meter enemy compound near Khost, Afghanistan, on or about 27 July 2002. (Memorandum for Commander, 28 Jul 02, at paras. 2(B)-C) (attachment B to D028).) Ground forces called in eight combat air support aircraft, which variously bombed and strafed the compound with high caliber cannon fire. (*Id.* at paras. 2(c), 2(G)). At least one 40mm round from an MK-19 grenade launcher was then fired on the target. (*Id*.) A fifteen-man ground assault element then penetrated the walls of the rubble in order to "clear the target," during which time witness statements report U.S. forces tossing hand grenades around what remained of the compound. (*See, e.g.*, RIA, 7 Dec 05 Summary of Soldier #3 Interview (attachment A); RIA, 7 Dec 05 Summary of Soldier #4 Interview (attachment B); RIA, 7 Dec 05 Summary of Soldier #5 Interview (attachment C).)

b. In support of Charge I, Murder in Violation of the Law of War, the government alleges that Mr. Khadr did, "while in the context of and associated with armed conflict and without enjoying combatant immunity, unlawfully and intentionally murder U.S. Army Sergeant First Class Christopher Speer, in violation of the law of war, by throwing a hand grenade at U.S. forces resulting in the death of Sergeant First Class Speer." (Charge Sheet at 1.)

c. In the Defense Motion to Dismiss Charge I for Failure to State an Offense and Lack of Subject Matter Jurisdiction, dated 7 December 2007, Defense counsel contended that Charge I did not state an offense triable by military commission because simple Murder is not a violation of the law of war. In its response, the Government alleged *two* theories of liability; that Mr. Khadr was guilty of "Murder by an Unprivileged Belligerent" and "Treacherous Killing," or the war crime of perfidy. (Govt. Resp. to D008, 14 Dec 07, at para. 6(B)(3)). In its decision, the military judge ruled that there "was a reasonable basis for Congress, in 2006, to determine that the offense of murder in violation of the law of war was part of the common law of war." (Ruling on D008, 21 Apr 08, at para. 7(1).) Without making clear what in the specification of Charge I demonstrated the elements of perfidy, or any other violation of the law of war, the military judge ruled that the "act alleged in the Specification, the killing of a lawful combatant by an unlawful combatant, is a violation of the law of war." (Ruling D008, at para. 9.)

6. **Argument:**

I. The Fifth Amendment Due Process Right to Fair Notice of the Charges Specified Applies to Detainees Held at GTMO

a. In *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), the Supreme Court reversed the authority trial counsel has consistently relied upon for the proposition that the "Constitution does not apply to aliens held outside the United States, including those held at Guantanamo Bay, such as Khadr." (*See, e.g.*, Government Response to the Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder), D013, dated 14 December 2007, at para. 6(a)(i); Government

Response to the Defense Motion to Dismiss for Lack of Jurisdiction (Equal Protection), D014, dated 18 January 2008, at para. 6(a)(ix); Government Response to the Defense Motion to Dismiss for Lack of Personal Jurisdiction (Child Soldier), D022, dated 25 January 2008, at n2.)

(1) The Court held that "questions of extraterritorial[] [application of the Constitution] turn on objective factors." *Boumediene*, 128 S.Ct. at 2253. These factors include whether the application of constitutional mandates would cause "friction with the host government," *id*. at 2261, the degree to which the federal government exercises plenary authority over the area, *id*., and whether logistical or security difficulties would make the application of a particular constitutional provision "impracticable or anomalous," such as if the area is "located in an active theater of war." *Id*. at 2262.

(2) Weighing these factors in the context of the Guantanamo detainees, such as Khadr, the Court concluded, GTMO is "a territory that, while technically not part of the United States, is under the complete and total control of our Government." *Id*. Like Puerto Rico, Guam and the other territories that have remained under the "complete jurisdiction and control" of the federal government since the conclusion of the Spanish American war, the federal government retains "de facto sovereignty over this territory." *Id*. at 2253.

(3) Before applying a particular constitutional provision in the context of this military commission, therefore, the military judge must now make a two-part inquiry. First, does the constitutional provision generally govern unincorporated territories, such as GTMO, that are nevertheless "within the constant jurisdiction of the United States"? *Boumediene*, 128 S.Ct. at 2261. Second, as this is a military commission convened under Article I, does the constitutional provision generally govern military proceedings? *See Weiss v. United States*, 510 U.S. 163 (1994); *Middendorf v. Henry*, 425 U.S. 25 (1976) ("Dealing with areas of law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference."); *see also* MCA sec. 948b(c) ("The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice)").

A. In first resolving the question of extraterritorial application, the Supreme Court placed GTMO alongside its sister territories, over whom the United States obtained and has continued to exercise "de facto sovereignty" since the conclusion of the Spanish American War. *Boumediene*, 128 S.Ct. at 2253.

i. The Court held that as soon as the federal government sought to govern the unincorporated territories, its authority was subject to "those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments." *Id.* at 2260 (citing *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 44 (1890)). The Supreme Court never questioned that "the guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application" in the unincorporated territories. *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922).

ii. Moreover, the Court recognized that "over time the ties between the United States and any of its unincorporated territories strengthen in ways that are of constitutional significance." *Boumediene*, 128 S. Ct. at 2262. This analysis led the Court to draw an express analogy between the current status of GTMO and Puerto Rico. Whatever factors may have cautioned against the application of the Constitution soon after the government obtained possession over these territories, they provide no continuing basis "for questioning the application of the Fourth Amendment-or any other provision of the Bill of Rights." *Id*. (quoting *Torres v. Puerto Rico*, 442 U.S. 465, 475-476 (1979) (Brennen, J., concurring)). Accordingly, there is no longer any doubt that such territories enjoy "the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment." *Examining Board v. Flores de Otero*, 426 U.S. 572, 600 (1976).

iii. Among the due process rights a defendant enjoys is the right to have the government specify in the indictment (or specification) each element of the alleged crime with a degree of clarity that provides fair notice of what the government's burden at trial will be. *United States v. Cruikshank*, 92 U.S. 542, 558 (1875). "It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, -- it must descend to particulars." *Id*.. at 558; *see also Russell v. United States*, 369 U.S. 749 (1962) (due process requires that "the indictment contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet"); *United States v. Corpus*, 882 F.2d 546 (1st Cir. 1989) (applying *Russell* in Puerto Rico).

B. While trial counsel is correct that "charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment," (Govt. Resp. to D088, at para. 6(B)(3)(f) (quoting *In re Yamashita*, 327 U.S. 1, 17 (1946))), "the allegations of the charge, tested by any reasonable standard, [must] adequately allege a violation of the law of war." *Yamashita*, 327 U.S. at 17.

i. The military is no stranger to criminal charges that incorporate or otherwise invoke a violation of customary law as the basis for liability. *See Parker v. Levy*, 417 U.S. 733, 747 (1974) ("[T]he longstanding customs and usages of the services impart accepted meaning to the seemingly imprecise standards."). UCMJ Articles 133 and 134 are routinely applied to criminally enforce the customs of the service, but charges pursuant to them cannot simply allege conduct without specifying which military custom was breached. Rather the specification must contain "the elements of the offense intended to be charged …, including words importing criminality or an allegation as to intent or state of mind where this is necessary." *United States v. Brice*, 38 C.M.R. 134, 137 (C.M.A. 1967) (citations omitted); *accord United States v. Acosta*, 41 C.M.R. 341, 343 (C.M.A. 1970).

ii. Due process depends upon whether the specification "contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *United States v. Vaughn*, 58 M.J. 29, 35 (C.A.A.F. 2003); *United States v. Davis*, 26 M.J. 445, 448 (C.M.A.1988).

iii. This is especially true when a violation of service custom is alleged. *See, e.g., United States v. Johanns*, 20 M.J. 155, 160 (C.M.A. 1985) ("[C]onstitutionally more important—the existence of such a custom would provide notice to officers, so that they would have no reasonable doubt as to the legal requirements to which they are subject."); *Vaughn*, 58 M.J. at 31 ("[A]s a matter of due process, a service member must have 'fair notice' that his conduct is punishable before he can be charged under [with violating a custom of the service]."). To satisfy due process, the CAAF and the Courts of Appeal for each of the services have recognized that the specification must specifically contain "words of criminality and provide an accused with notice as to the elements against which he or she must defend." *Vaughn*, 58 M.J. at 36. *United States v. Peszynski*, 40 M.J. 874 (N.M.C.M.R. 1994) ("[S]pecifications drawn under Article 134 must allege conduct clearly defined and easily recognizable in the military context as criminal."); *United States v. Kroop*, 34 M.J. 628 (A.F.C.M.R. 1992) (The specification failed to allege "the element of a violation of a custom of the service"); *United States v. Blake*, 35 M.J. 539 (A.C.M.R. 1991) ("The government also concedes that by excluding the custom of the Army language from the specification, it eliminated, either expressly or impliedly, an essential element of the offense. Therefore, the specification, as amended, does not allege an offense.").

(4) It is therefore an established requirement of both military and civilian due process that the specification allege each element of the offense. If the government alleges a breach of customary law, the government must specify what custom was breached and how, since even Article 134 is not "such a catchall as to make every irregular, mischievous, or improper act a court-martial offense." *United States v. Sadinsky*, 34 C.M.R. 343, 345 (C.M.A. 1964). The question therefore before the military judge is whether the specification of Charge I, Murder in Violation of the Law of War, adequately alleges all the elements of the offense so that Mr. Khadr can know what burden the government must meet, what elements it must prove and what jeopardy will attach.

II. The Government has Violated Due Process by Failing to Specify All the Elements of the Offense of Murder in Violation of the Law of War

a. The requirement that the specification describe how the alleged conduct meets the elements of the offense is especially acute when the crime alleged is a breach of customary law. Otherwise, the government could allege a vague breach of custom and proceed to trial, shifting its theory of the case as the evidence develops in the hopes that it could prove a violation along the way. This fundamentally warps the government's burden of proof, since its task then becomes convicting the defendant, rather than proving the elements of a specified crime.

b. <u>The Specification is Ambiguous as to the Government's Burden of Proof on each of the Elements</u>

(1) Here, the specification on Charge I contains the bald assertion that Mr. Khadr, by throwing a hand grenade in a firefight, violated the law of war. It alleges that he did this without "combatant immunity" and that he did it "in violation of the law of war."

A. Only in response to a motion to dismiss, did trial counsel articulate its theory of how the killing violated the law of war. In doing so, trial counsel articulated two,

distinct theories of its case: that Mr. Khadr either committed the war crime of "Unprivileged Belligerency," (Govt. Resp. to D008 at 4-7), and/or that he committed the war crime of "Perfidy" (Govt. Resp. to D008, at 7-8). Trial counsel, therefore, exacerbated the vagueness of Charge I by creating an ambiguity over whether proving that Mr. Khadr lacked combatant immunity was in itself sufficient to satisfy this element of the charge.

B. The military judge did not resolve this question, but simply ruled that by its own terms, the crime of Murder in Violation of the Law of War requires some violation of the extant laws of war, and that Congress was therefore reasonable in deciding it "was part of the common law of war." (Ruling on D008, at para. 7(1).) The military judge did not articulate on which theory the acts alleged satisfied the statute. In fact, neither the phrase "unprivileged belligerency" nor "perfidious/treacherous killing" appear in the military judge's decision.

C. At the time, trial counsel and the military judge understood the controlling law as placing no due process requirement on the government. (*See, e.g.*, Ruling on D014, at para. 4(c) ("there is no authority, binding on this commission, which holds that a person similarly situated to Mr. Khadr is entitled to all of the protections of the Constitution"). Now that the Supreme Court has reaffirmed that the Constitution remains supreme, however, it is incumbent upon the government to specify with particularity what violation of the law of war Mr. Khadr breached. It has asserted two theories –"Murder by an Unprivileged Belligerent" and "Perfidy." The government must therefore demonstrate that either or both constitute violations of the laws of war *and* that the charge sheet adequately alleges their constituent elements.

c. <u>The Government's First Theory of Liability, that Murder by an Unprivileged Belligerent Satisfies all the Elements of the Offense, Violates Due Process by Collapsing Two Distinct Statutory Elements into One</u>

(1) It is understandable that the government would seek to hedge its bets with respect to whether "Unprivileged Belligerency" is a war crime, since it does not feature as an offense in the Geneva or Hague Conventions—two treaties the Supreme Court has called "the major treaties on the law of war." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2781 (2006).

A. The greatest doubt over the status of "Unprivileged Belligerency" as a war crime arises not from any treaty or treatise, however, but from the government's own enumeration of war crimes in the commission system that formed the model for the MCA.

i. Under the previous military commission system, Military Commission Instruction No. 2 enumerated the crimes triable and divided them into three classes. Department of Defense, Military Commission Instruction No. 2, Crimes and Elements for Trial by Military Commission, 30 Apr 03 ("MCI2"). Class A constituted "War Crimes," MCI2 at para. 6(A), Class B constituted "Other Offenses Triable by Military Commission," MCI2 at para. 6(B), and Class C constituted "Other Forms of Liability and Related Offenses," MCI2 at para. 6(C). "Murder by an Unprivileged Belligerent" was enumerated, along with crimes such as "Perjury" and "Obstruction of Justice," as a Class B crime. Its elements, as defined by MCI2, were:

1) The accused killed one or more persons;
2) The accused:
(a) intended to kill or inflict great bodily harm on such person or persons;
or
(b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;
3) The accused did not enjoy combatant immunity; and
4) The killing took place in the context of and was associated with armed conflict.

MCI2, at para. 6(B)(3). Nowhere did its elements contain any requirement that the killing violate the law of war.

ii. Of the thirty crimes made punishable under the MCA, Congress incorporated all but two of the substantive offenses provided in MCI2. Those were "Murder by an Unprivileged Belligerent" and "Destruction of Property by an Unprivileged Belligerent." MCI2, at paras. 6(B)(3)-(4). Congress declined to include these offenses, favoring instead a requirement that the unlawful killing (or destruction of property) also entail, as an element of the offense, a violation of the law of war.[1] MCA 950v(b)(15)-(16). Accordingly, the Manual for Military Commissions included two lawfulness elements, where MCI2 had only one. It required *both* that the killing be unlawful *and* that it was done in violation of the law of war:

1) One or more persons are dead;
2) The death of the persons resulted from the act or omission of the accused;
3) The killing was unlawful;
4) The accused intended to kill the person or persons;
5) The killing was in violation of the law of war; and
6) The killing took place in the context of and was associated with an armed conflict.

MMC, Part IV, para. 6(a)(15).

iii. In a "comment," the MMC states in relevant part that "For the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy." MMC, Part IV, para. 6(a)(13)(c), Comment. This is the closest the MMC comes to defining the crime of "Murder by an Unprivileged Belligerent," and it is not at all clear that is what this comment means to accomplish. It does not define "violation of the law of war," but simply restates that the violation of the law of war must be perpetrated by someone who meets the definition of

[1] By way of analogy, Congress similarly added the element of "in breach of an allegiance or duty to the United States" to the elements of Aiding the Enemy. MCA 950v(b)(26). Under MCI2, this element was not present and, in fact, the government had alleged Aiding the Enemy in the first Charges referred against Mr. Khadr. (See Charge Sheet (Attachment B to Defense Motion to Dismiss for Violation of the Sixth Amendment Right to a Speedy Trial).) Congress knew how to add elements to offenses proscribed by MCI2, and did so pursuant to its desire to ensure that the MCA was "declarative of existing law," so as to "not preclude trial for crimes that occurred before the date of the enactment." MCA 950p.

"unlawful enemy combatant."[2] Thus, this comment merely restates the MCA –that the crime could not be charged against a lawful enemy combatant, even if, without justification (i.e. unlawfully), he killed someone in a manner that violated the laws of war.

B. If Congress wanted to criminalize "Unprivileged Belligerency," it had a clear model for how to do so in MCI2, from which it borrowed whole stock, even to the point of largely preserving MCI2's ordering of the crimes.

i. If Congress had any doubt about the scope of "in Violation of the Law of War," they had to look no further than MCI2. There they would have found a list of 18 violations of the laws of war, so identified, which did not include "Murder by an Unprivileged Belligerent," nor the crimes of "Perjury" and "Obstruction of Justice." MCI2 at para. 6(A).

ii. Since Congress specified that the very jurisdiction of this military commission turns on whether the accused had combatant immunity, Congress' choice to specify that the killing must also entail some war crime demonstrates its clear intention not to conflate liability for murder (and attempted murder) with personal jurisdiction. *See* MCA § 948a(1)(i). If these were not distinct elements, *anyone* who "engaged in hostilities or … has purposefully and materially supported hostilities against the United States or its co-belligerents [and] is not a lawful enemy Combatant," would not only be an unlawful enemy combatant, but a murderer or attempted murderer.

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[2] Even if Congress intended to legislate the crime of "Unprivleged Belligerency," such an interpretive rule has no force of law and cannot substitute for the government's duty to specify, with particularity, the conduct it believes violated a statutory element. *See United States v. Mead Corp.*, 533 U.S. 218, 232 (2001) ("interpretive rules … enjoy no *Chevron* status as a class"); *Stinson v. United States*, 508 U.S. 36, 44 (1993) ("Commentary, unlike a legislative rule, is not the product of delegated authority for rulemaking, which of course must yield to the clear meaning of a statute."); *Chevron* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

Whatever deference such interpretive commentary should be accorded is at a minimum outweighed by the rule of lenity. *Crandon v. United States*, 494 U.S. 152, 178 (1990) ("Scalia, J., concurring) ("[T]o give persuasive effect to the Government's expansive [administrative interpretation] would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity."). The rule of lenity is rooted in the fundamental principle that "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). The "law of war" has a common and understandable meaning in the world that is contained in many and diverse treaties, statutes and field manuals. Especially in light of the government's expansive theory of principal liability, Mr. Khadr would have had no notice he might be violating the commentary of a regulation implementing a statute passed and promulgated more than four years after the alleged offense.

iii. Trial counsel cannot obtain from a clever litigation position or reliance upon vague interpretive rules, what it could not obtain from Congress. The military judge must "interpret the law as Congress has expressly stated it to be." *United States v. Berg*, 30 M.J. 195 (CMA 1990). It must prove "the killing was unlawful" by showing the defendant did not enjoy "combatant immunity," or any other privilege that would make a killing lawful, such as self-defense, *and* it must show that the killing was done in violation of the law of war.

C. Absent any contemporary legislative, customary or conventional authority, trial counsel cited mostly Civil War era treatises and an Attorney General opinion, which refer to the prosecution of, "bushwackers," "jayhawkers," "bandits," "war rebels" and "assassins," as support for the proposition that "Murder by an Unprivileged Belligerent" is a modern war crime in and of itself.[3] (Govt. Resp. to D008 at 4-7.) The military judge did not incorporate any of these citations into his opinion. Although this may have at least provided clarity as to the elements the government must prove, there are a number of reasons why this would have been unwarranted.

i. Trial counsel's characterization of the Civil War era precedents is selective and misleading.

(a) The "bushwackers" and "jayhawkers" were guerilla insurgents in the Union controlled areas of Kansas and Missouri. *See* THOMAS GOODRICH, BLACK FLAG: GUERRILLA WARFARE ON THE WESTERN BORDER, 1861-1865 (Indiana University Press 1999). This is an important distinction because the authorities trial counsel relies upon were principally responding to the threat posed by the invisible domestic enemy that characterized much of the Civil War, particularly in boarder States.

(b) The primary authority Winthrop relies upon is the Lieber Code. *See* COL. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 783, n.55 (1895, 2d ed. 1920) ("WINTHROP"). The Lieber Code in turn proscribed irregulars who conducted operations "without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers." General Orders No. 100, Adjutant General's Office, 1863, art. 82 ("Lieber Code"). These were not, according to the

[3] Trial counsel does not even support its position by an honest quoting of the arcane precedent to which it resorts. The cut and paste from the opinion of Justice Iradell in *Talbot v. Jansen*, 3 U.S. 133 (1795) does not stand for the proposition that any and all "'hostility committed without public authority' is 'not merely an offence against the nation of the individual committing the injury, *but also against the law of nations . ...*'" (Gov't Resp. to D008, at para. 6(B)(ii).) Indeed, to make it appear that it did, trial counsel had to excise *four* words from the middle of its quotation, which in full reads "hostility committed without public authority *on the high seas*, is not merely an offence against the nation of the individual committing the injury, but also against the law of nations…." *Talbot*, 3 U.S. at 161. Defense counsel do not contest that the crime of piracy is perhaps one of the oldest violations of international law. The Charge Sheet, however, makes no allegation of piracy on the high seas and if trial counsel wishes to make an analogy, it should at the very least be forthright in doing so.

Lieber, "public enemies," but insidious, often traitorous, bandits, spies and assassins, who took active steps to exploit the appearance of protected status.

(c) This contrasts with Winthrop's treatment of "savage" forces, such as Indians. Indians were not lawful belligerents as recognized by the custom of the day. Nevertheless their belligerent acts were not generally seen as war crimes, both because they were a recognizable enemy on account of being foreign and perpetrated acts of violence "incidental to a state of war then pending." WINTHROP at 778, 869.

ii. The fatal flaw of trial counsel's argument, however, is not in its characterization of Civil War era history. It is that the demonstration of a military custom during the Civil War is not the demonstration of customary law today.[4] *"A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been long abandoned*." *United States v. Johanns*, 20 M.J. 155, 159 (C.M.A. 1985) (emphasis in original); *see also United States v. Wickersham*, 14 M.J. 404 (C.M.A. 1983) ("[I]n determining what offenses are actually prohibited by this statute, recourse must be had to authoritative interpretations of military law, *existing* service customs, and common usages.") (emphasis added).

(a) Winthrop, the Lieber Code and the Articles of War that governed prior to the UCMJ tell us the state of the law of war in the Nineteenth Century. *See Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) ("After the Second World War, the law of war was codified in the four Geneva Conventions, which have been ratified by more than 180 nations, including the United States."). Lieber and Winthrop both wrote before the advent of mechanized warfare, two world wars, the Hague and Geneva Conventions, and the open and close of the Twentieth century, which not only saw dozens of treaties codify, refine and expand the laws of war, but the United States' leadership in creating international criminal courts to prosecute offenders against it in Yugoslavia, Rwanda, Sierra Leone and elsewhere. Despite their jurisdiction over the most brutal guerilla wars in modern history, none of these international criminal courts has prosecuted "Murder by an Unprivileged Belligerent."[5]

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[4] Indeed by 1901, a writer on international Public Law wrote that while the employment of "savages" had been universally condemned, "Whether guerrillas or partisans can be legitimately employed in war is less clear." HARRIS TAYLOR, A TREATISE ON INTERNATIONAL PUBLIC LAW 476 (Callaghan & Co. 1901).

[5] *See Prosecutor v. Tadic*, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, at para. 94 ("The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. … (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule."). In elaborating upon factor (i), the Appeals Chamber in *Tadic* described the customary laws of war at length and concluded, "These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians

(b) Winthrop no more writes about genocide than he does about blinding lasers. He condones the targeting of civilian infrastructure, WINTHROP at 779, but condemns the use of explosive projectiles, which would constitute most RPGs in use today. *Id*. at 785. He condones reprisals against POWs and collective punishments,[6] *id*. at 797, as well as the imposition upon occupied civilians of forced labor camps[7] and religious indoctrination,[8] *id*. at 811-815, but condemns targeting government buildings. *Id*. at 780.

(c) The only contemporary authority trial counsel cited was the ARMY FIELD MANUAL ON THE LAW OF LAND WARFARE, FM 27-10, which *does not* list "Unprivileged Belligerency" as a war crime, but only provides (what defense counsel does not contest) that "guerrillas and partisans … [are] not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment."[9] In its comprehensive chapter on the conduct of hostilities, FM 27-10, at ch. 2, nowhere is "Unprivileged Belligerency" listed or even alluded to as among the war crimes. *Cf. United States v. Wales*, 31 M.J. 301, 309 (C.M.A. 1990) ("We also are troubled that a 'custom' which is the basis for trying appellant for a crime … was to be proved at trial by nothing more than a general statement in a nonpunitive regulation.").

(d) Accordingly, the government cannot point to one instance of a U.S. military court prosecuting "Murder by an Unprivileged Belligerent" in the post-Geneva Convention world. This is despite the U.S. having encountered guerilla forces in Korea and Vietnam, and the U.S. military's routine support for guerillas as early as the Korean

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from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities." Nowhere did the Appeals Chamber identify "Murder by an Unprivileged Belligerent," or anything resembling it, as prohibited under the modern law of war.

[6] *See contra* GCIII, at art. 87; GCIV, at art. 33.

[7] *See contra* GCIV, at art. 51.

[8] *See contra* GCIV, at arts. 31, 38(3); 58.

[9] The government's repeated reliance upon *Ex parte Quirin* for the proposition that any attacks launched by "unlawful enemy combatants" are *per se* violations of the law of war is wholly misplaced. (*See, e.g.*, Govt. Resp. to D008, at para. 6(B)(ii)(g).) The Court in *Quirin* meticulously established an uninterrupted line of authority for the law of war criminalization of "armed prowlers" crossing behind enemy lines, akin to saboteurs and spies. *Ex parte Quirin*, 317 U.S. 1, 31-36 (1942). It was this very specific and precisely defined crime that could be charged against "enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform -- an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission." *Quirin*, 317 U. S. at 46. Quite purposefully, the Court in *Quirin* reserved judgment on "the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war." *Id*. Nowhere in the decision does the Court make a holding on or even consider whether mere participation in open combat on foreign soil is a violation of the law of war.

War. *See, e.g.*, Guerrilla Operations Outline, Far East Command Liaison Detachment (Korea), 8240th Army Unit Guerrilla Section, 11 April 1952.

(e) While Winthrop may be the "Blackstone of military law," his MILITARY LAW AND PRECEDENTS is no more a definitive statement of the law of war in the Twenty-First Century, than Blackstone's COMMENTARIES ON THE LAWES OF ENGLAND is of the modern common law. Congress did not enact a statute criminalizing belligerency by "jayhawkers," nor did it criminalize "Murder by an Unprivileged Belligerent." Congress gave this military commission jurisdiction over Murder in Violation of the Law of War, and in 2008, Violations of the Law of War are readily ascertainable from numerous treaties, field manuals and the decisions of international criminal courts.[10] None of these include "Murder by an Unprivileged Belligerent" and when the government originally sought to punish this crime in MCI2, it did not include it among the violations of the laws of war either.

iii. Had Congress enacted "Murder by an Unprivileged Belligerent" as a crime cognizable by the military commission, then the government would at least have an argument that it need assert nothing more than the fact that Mr. Khadr participated in combat without combatant immunity. Failure to have combatant immunity, however, satisfies only one element of the crime as set forth in the MMC – the element of unlawfulness, which no doubt could strip Mr. Khadr of POW status and subject him to the jurisdiction of the federal courts, *see, e.g.*, 18 U.S.C. § 2332a, or an occupation commission for his belligerent acts.[11] It

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[10] *See, e.g.*, 1 International Committee of the Red Cross, Customary International Humanitarian Law 569 (Jean Marie Henckaerts & Louise DoswalDBeck eds., 2005) (listing war crimes compiled from a variety of international legal sources); Rome Statute for the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) (described by one federal judge as "signed by 139 countries and ratified by 105, including most of the mature democracies of the world. It may therefore be taken 'by and large ... as constituting an authoritative expression of the legal views of a great number of States.'" *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 276 (2d. Cir. 2007) (Katzmann, J., concurring)); Major Richard Baxter, *So-Called Unprivileged and Belligerency: Spies, Guerrillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 326 (1951); Norman A. Goheer, The Unilateral Creation of International Law During the "War on Terror": Murder by an Unprivileged Belligerent is not a War Crime, Bepress Legal Series Working Paper 1871, at 12 (Nov. 8, 2006), *available at* http://law.bespress.com/expresso/eps/1871.

[11] As the Supreme Court recognized in *Hamdan* and in *Madsen v. Kinsella*, 343 U.S. 341, 356 (1952), the military can convene military commissions in occupied territory such as those "established, with jurisdiction to apply the German Criminal Code, in occupied Germany following the end of World War II." *Hamdan*, 126 S.Ct. at 2776. These commissions are always hybrid courts, applying an *ad hoc* mixture of local law and military law as it suits "the exigencies that necessitate their use." *Hamdan*, 126 S.Ct. at n.26; *see also* Organization and Procedures of Civil Affairs Division: Military Government of Germany; United States Zone (1947); 12 Fed. Reg. 2191 § 3.6(b)(2) ("Military Government Courts shall have jurisdiction over: (i) All offences against the laws and usages of war; (ii) All offences under any Proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of

does not demonstrate, on its face, the necessary violation of the law of war that Congress required, and trial counsel cannot, consistent with due process, conflate two distinct elements of the offense. *See, e.g., United States v. NYNEX Corp.*, 8 F.3d 52, 55 (D.C. Cir. 1993) ("In other words, the District Court seemed to think that if NYNEX officials acted *willfully* they necessarily *violated a clear* order of the court. This reasoning improperly conflates the elements of criminal contempt, and it unacceptably alters the Government's burden of proof.") (emphasis in original); *see also United States v. Berg*, 30 M.J. 195 (C.M.A. 1990) (to conflate the elements of unpremeditated murder, Art. 118(2), UCMJ, with the elements of murder by an act inherently dangerous to others, Art. 118(3), UCMJ, would "deny the accused due process.").

c. The Government's Second Theory of Liability, that Mr. Khadr Committed Perfidy, is Unsupported by the Specification

(1) Apparently aware of this shortcoming, trial counsel created ambiguity by also alleging, again not in the specification but in its legal argument, that the violation of the law of war element is satisfied by Mr. Khadr's alleged perfidy. (Govt. Resp. to D008, at 7-8.)

A. If the government specified this and could prove it, Mr. Khadr could be found guilty of Murder in Violation of the Law of War. He would have both acted unlawfully, as an unprivileged belligerent, and in violation of the law of war, by conducting a perfidious attack. The MCA is clearly motivated by a desire to stamp out the most insidious forms of guerilla warfare, where attacks are conducted by individuals who invite the belief that they are protected persons by "divesting themselves of the character or appearance of soldiers."

B. In fact, this is precisely how the government alleged Murder in Violation of the Law of War in the military commission case of *United States v. Nashiri*:

> [W]hile in the context of an associated with armed conflict, intentionally and unlawfully kill seventeen persons and members of the United States Armed Forces, in violation of the law of war, by causing two men dressed in civilian clothing and operating a civilian vessel lade with explosives and denoting said boat-bomb along side the United States Ship (U.S.S.) COLE . . . .

Nashiri Charge Sheet at 8 (attachment D). This specification makes plain on its face, both that the killing was unlawful, (i.e. was murder), *and* that it was in violation of the law of war (i.e. perfidious).

C. By contrast, all that Charge I alleges against Mr. Khadr is that during a conventional battle, while U.S. forces were throwing hand grenades around him, that he "violated the law of war, by throwing a hand grenade at U.S. Forces, resulting in the death of Sergeant First Class Speer." (Charge Sheet at 1.) Nothing in this specification alleges the elements of perfidy. It is not alleged that he feigned protected status, *hors du combat*, or even that he skulked up to unsuspecting U.S. soldiers, exploiting his civilian appearance to ambush them. He was a clear and lawful target of attack, as evidenced by our own soldiers initiating

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the Allied Forces; (iii) All offences under the laws of the occupied territory *or* of any part thereof.").

combat air support and ultimately shooting him twice in the back. On its face, the allegation is that he participated in conventional combat. But this does not allege a murder done in violation of the law of war.

III. Dismissal of Charge I is Warranted for the Government's Failure to Provide Fair Notice of the Elements Mr. Khadr must Defend Against

a. Not all violent and illegal conduct is a war crime. The government cannot allege some violent act and leave to guess, speculation and strategic litigation what acts might satisfy the elements of an offense.

(1) The law of war means something definite in the modern world. It is not found in treatises from the Civil War anymore than it is found in the Knight's Code of Chivalry. It has been refined in modern treaties and applied by international criminal courts that the United States has principally sponsored and organized. None of these have made conventional combat a war crime, and would not do so.

(2) The urban nature of warfare in the Twenty-First Century, even more than in the Twentieth, and demonstrably more than in the Nineteenth, creates enormously perverse incentives for guerilla combatants to launch attacks from civilian areas against unsuspecting U.S. forces. This corrodes the trust of our forces, who respond by presuming that all apparent civilians are enemies. Accordingly, the modern laws of war do not prohibit conventional conflict, since to do so would make no distinction between the grenade thrown in an open and pitched battle, the grenade slipped into a truck riding down a civilian street and the grenade concealed in a bassinet. It would remove all incentive for guerillas to wage hostilities in the open at all.

(3) Dismissing Charge I does not prevent the government from alleging Murder in Violation of the Law of War in any other case or even this case, so long as the specification provides the fair notice that due process requires for each element of the offense. Nor does it prevent the government from proving the conduct alleged in Charge I as overt acts in support of Charges III and IV or as aggravating factors at sentencing. Dismissing Charge I merely requires trial counsel to meet a minimal burden of specificity in the charges it alleges and ensures that it is Congressional legislation, and not trial counsel's motions practice, that defines the laws of war.

7. **Oral Argument:** The defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h). Oral argument will assist the Commission in understanding and resolving the complex legal issues presented by this motion.

8. **Witnesses and Evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the prosecution's response raise issues requiring rebuttal testimony. The Defense relies on the following as evidence in support of this motion:

Attachments A through D.

Memorandum for Commander, 28 July 2002 (Attachment B to D028)

9. **Certificate of Conference:** The defense has conferred with the prosecution regarding the requested relief. The prosecution objects to the requested relief.

10. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

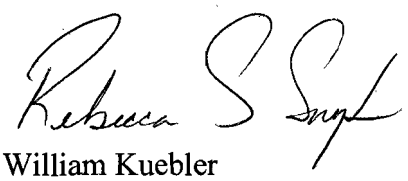
11. **Attachment:**

A. Report of Investigative Activity, Summary of Soldier #3 Interview, 7 December 2005

B. Report of Investigative Activity, Summary of Soldier #4 Interview, 7 December 2005

C. Report of Investigative Activity, Summary of Soldier #5 Interview, 7 December 2005

D. Nashiri Charge Sheet



William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Detailed Assistant Defense Counsel

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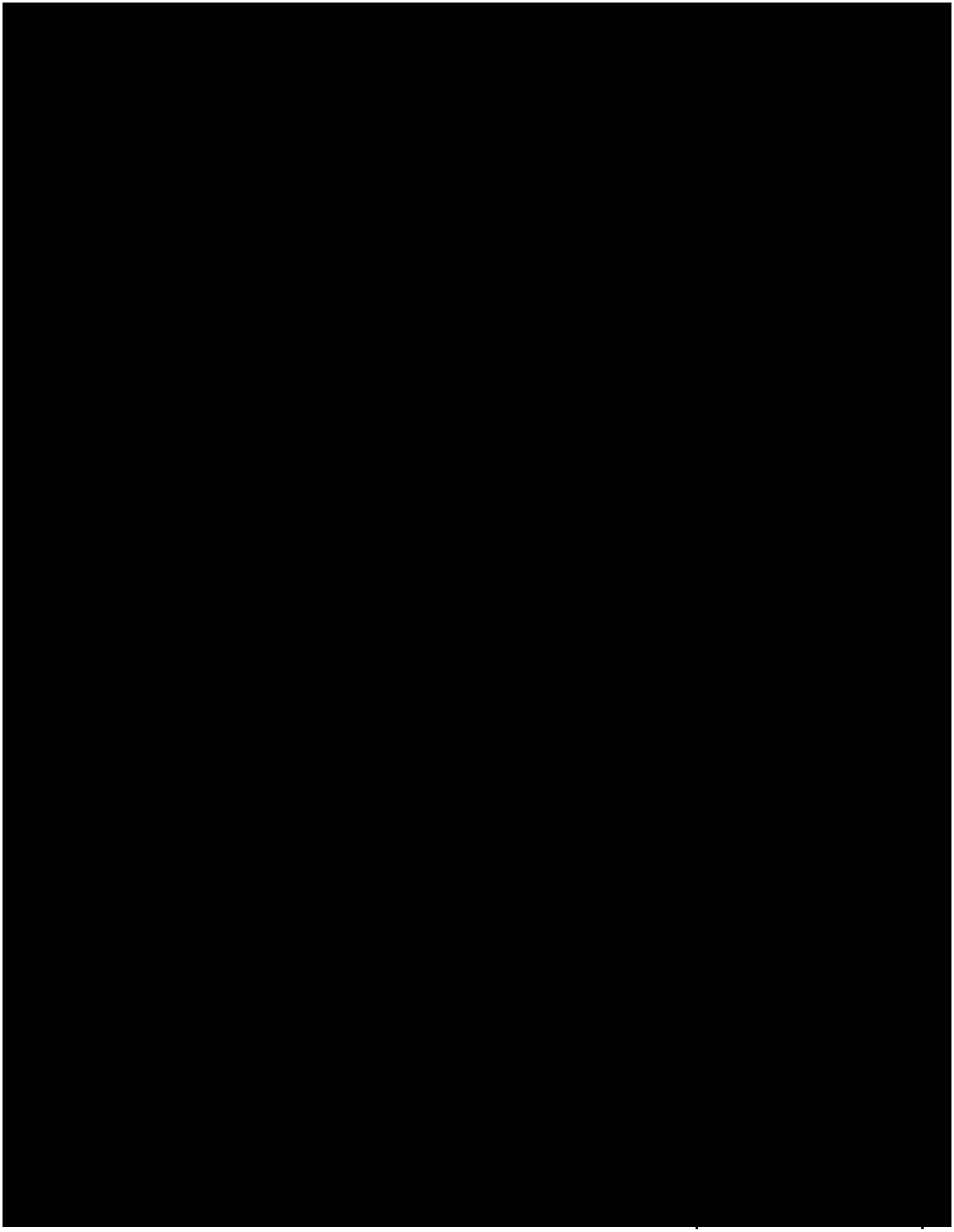

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UNCLASSIFIED/FOUO/LES

Attachment C

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[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
'Abd al-Rahim Hussein Muhammed Abdu AL-NASHIRI

2. ALIASES OF ACCUSED:
SEE ATTACHED CONTINUATION SHEET. HEADNOTE OF CHARGES AND SPECIFICATIONS

3. ISN NUMBER OF ACCUSED (LAST FOUR):
[redacted]

II. CHARGES AND SPECIFICATIONS

4. CHARGE: **VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.**

SPECIFICATION:

SEE ATTACHED CONTINUATION SHEET OF BLOCK II. CHARGES AND SPECIFICATIONS

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (*LAST, FIRST, MI*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
Groharing, Jeffrey D	Major	Office of Military Commissions

5d. SIGNATURE OF ACCUSER	5e. DATE (YYYYMMDD)
Jeffrey D. Groharing	20080630

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 30 day of June, 2008, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

[redacted]

Office of Military Commissions
Organization of Officer

Captain, U.S. Army
Grade

Judge Advocate
Official Capacity to Administer Oath
(See R.M.C. 307(b) must be commissioned officer)

[redacted]

MC FORM 458 JAN 2007

Attachment D

IV. NOTICE TO THE ACCUSED

6. On _____, _____ the accused was notified of the charges against him/her (See R.M.C. 308).

_____ _____

Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges

Organization of the Person Who Caused Accused to Be Notified of Charges

_____

Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at _____ hours, on _____, at _____

_____.

Location

For the Convening Authority: _____

Typed Name of Officer

_____

Grade

_____

Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)

Referred for trial to the (non)capital military commission convened by military commission convening order _____

_____.

_____ subject to the following instructions[1]: _____

_____

By _____ of _____

Command, Order, or Direction

_____ _____

Typed Name and Grade of Officer

Official Capacity of Officer Signing

_____

Signature

VII. SERVICE OF CHARGES

9. On _____, _____ I (caused to be) served a copy these charges on the above named accused.

_____ _____

Typed Name of Trial Counsel

Grade of Trial Counsel

_____

Signature of Trial Counsel

FOOTNOTES

[1]See R.M.C. 601 concerning instructions. If none, so state.

MC FORM 458 JAN 2007

CONTINUATION SHEET - MC FORM 458 JAN 2007, Block II. Charges and Specifications in the case of UNITED STATES OF AMERICA v. 'ABD AL-RAHIM HUSSEIN MUHAMMED ABDU AL-NASHIRI a/k/a Bilal; Mullah Bilal; Abu Bilal al-Makki; Khalid al-Safani; 'Amr al-Harazi; Amm Ahmad; Abdul Rahim Nasheri; 'Abd al-Rahim Musayn Muhammad 'Abda Nashir; 'Abd al-Rahim Hussein Mohammed al-Nashiri; Adil Ibn Shanan Ibn Muhammad al-Mu'abbadi; Saeed Abdallah Qasem Al-Mansouri; Mahyoub Qaed Saeed al-Qabati; Abu al-Miqdad, Abdoh Hussein Mohammed, Abd al-Raheem Hussein Mohammed Abdoh al-Nasiri, Saeed Abdallah Qasem al-Mansouri, 'Abd al-Rahim Husayn, Muhammad Nashir al-Safani al-Harazi, Abdul Muhammad Husayn, Muhammad Nashri, Muhammad Omar Harazi, Bilal al-Makki, Husayn Muhammad Abdu al-Nashir al-Safani al Harazi, Said Abdallah Qasim al-Masuri, Abdal-Rahimhussein Muhammad Abdu al-Shiri, Muhammad Umar al-Harazzi, Ahmad Ahmad Hassan Amin al-Aafani al-Harazi, Abu Jaffar

CHARGE I: VIOLATION OF 10 U.S.C. § 950v(b)(28), CONSPIRACY

Specification 1: In that 'Abd al-Rahim Hussein Muhammed Abdu AL-NASHIRI (a/k/a "Bilal" et. al; hereinafter Nashiri), a person subject to trial by military commission as an alien unlawful enemy combatant, did, from in or about 1996 through in or about 2002, in and around the Middle East, Arabian Peninsula, Yemen, Afghanistan, and other locations, conspire and agree with Usama Bin Laden, Ayman al Zawahiri, Mohammed Atef (a/k/a Abu Hafs al Masri), Saif al Adel, Mushin Musa Matwalli Atwah (a/k/a Abdul Rahman Al-Muhajir), Walid Muhammad Salih Mubarak Bin 'Attash (a/k/a Khallad), Jamal Ahmed Mohammed Ali al-Badawi, Fahd Mohammed Ahmed al-Quso, Wahib al-Khadher, Hassan Sa'id Awad al-Khamiri (a/k/a Hassan), Ibrahim al-Thawar (a/k/a Nibras), Taha Ibrahim Hussein al-Ahdal, Hadi Muhammad Salih al-Wirsh (a/k/a Hadi Dilkum), and other members and associates of the al Qaeda organization and its affiliated groups, known and unknown, to commit the following offenses triable by military commission: murder in violation of the law of war, treachery and perfidy, hijacking or hazarding a vessel or aircraft, destruction of property in violation of the law of war, intentionally causing serious bodily injury, attacking civilians, attacking civilian objects, and terrorism, the said Nashiri knew the unlawful purpose of the agreement, and in order to accomplish some objective or purpose of this agreement, Nashiri and his co-conspirators knowingly committed certain overt acts, including, but not limited to:

1. In or about 1996, Nashiri met Usama Bin Laden, and heard him speak of the coming war against the United States. Approximately two years prior, Nashiri returned from fighting in Tajikistan and met Usama Bin Laden for the first time in Jalalabad, Afghanistan where Nashiri and Khallad stayed for about one week at an al Qaeda guesthouse.

2. On or about August 23, 1996, Usama Bin Laden issued a public "Declaration of Jihad Against the Americans," in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.

3. In or about March, 1997, in an interview with CNN, Usama bin Laden promised to "drive Americans away from all Muslim countries," and warned the U.S. "to get out" if it did "not want to have its sons who are in the army killed." Usama bin Laden

could "not guarantee" the "safety" of U.S. civilians since they were "not exonerated from responsibility" for U.S. foreign policy "because they chose the government and voted for it despite their knowledge of its crimes." He promised that if his demands were unmet, he would send the U.S. "messages with no words because" the U.S. President "does not know any words."

4. In or about February 1998, Usama Bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a fatwa (purported religious ruling) requiring all Muslims able to do so to kill Americans -- whether civilian or military -- anywhere they can be found and to "plunder their wealth."

5. On or about May 29, 1998, Usama Bin Laden issued a statement entitled "Islamic Nuclear Bomb," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which UBL stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

6. In or about 1998, Nashiri joined al Qaeda.

7. In or about August 1999, Nashiri, using the name "Abda Hussein Mohammed" leased a residence with a courtyard in the Madinat al-Shab section of Aden Yemen

8. In or about August 1999, Nashiri installed a gate to the yard of the Madinat Al-Shab property in order to move a boat in and out of the yard.

9. Between in or about September 1999 through November 1999 Nashiri delivered a white boat alongside the public road in front of the Shabwa gas station in Al Hudaydah Yemen and left it at that location for 10-15 days.

10. Between in or about September 1999 through November 1999 members of the conspiracy contracted with a truck driver for hire, to use his truck to transport a white boat from in front of the Shabwa gas station in Al Hudaydah to Aden Yemen.

11. Between in or about September 1999 through November 1999, members of the conspiracy delivered a white boat inside the courtyard of the Madinat Al Shab house.

12. In or about November 1999 Nashiri and Taher Hussein Tuhami traveled to the warehouse of the Daewood Company in Al Hudaydah Yemen and picked up a 200 Horsepower Yamaha outboard motor which Tuhami had purchased from the company.

13. In or about December 1999, Nashiri rented the second floor of a house in the Al Tawahi District of Aden with a view overlooking the Aden harbor.

14. On or about January 3, 2000, members of the conspiracy transported a bomb-laden boat from the Madinat Al-Shab location to the beach front at Aden harbor

15. On or about January 3, 2000, as the United States Ship (U.S.S.) THE SULLIVANS was refueling in Aden Harbor, Hassan Sa'id Awad al-Khamiri (a/k/a Khamri) and others known and unknown, launched from Al-Haswah beach area in Aden Harbor an explosives-laden attack boat, which sank shortly after launching.

16. On or about January 4, 2000, Nashiri and others known and unknown, traveled to the Al-Haswah beach area of Aden Harbor and salvaged the sunken boat and explosives.

17. Following the failed attack on the USS THE SULLIVANS, Nashiri, and others known and unknown returned to Afghanistan to meet with Usama Bin Laden and discuss reorganization of the plot.

18. Following his meeting with Usama Bin Laden, Nashiri returned to Aden, Yemen and was joined there by Khamri and Ibrahim Al-Thawar (a/k/a "Nibras") to continue the planning and preparation for a future attack on a United States naval vessel.

19. Throughout the Spring and Summer of 2000, Nashiri regularly spoke by telephone to Khallad who was in Pakistan who then traveled to Afghanistan to relay messages to Usama Bin Laden concerning the progress of the plot.

20. In the Summer of 2000, Nashiri asked Khallad to relay a message to Usama Bin Laden that the "boats operation" was nearly ready and that Bin Laden should send the "martyrs" to be used in the attack.

21. In or about the summer of 2000, Khamri leased a safehouse in the Al-Burayqat Kud Al-Namer area of Aden, Yemen.

22. In or about the summer of 2000, Khamri and Nashiri leased an apartment perched on the hills of the Al-Tawahi area of Aden, Yemen, overlooking Aden Harbor where the USS COLE would later be berthed for refueling.

23. In or about September 2000, in an interview with an Arabic-language television station, Usama Bin Laden called for a "jihad" to release the "brothers" in jail "everywhere."

24. In or about the spring and summer of 2000, Khallad and Nashiri met with Usama Bin Laden and others in or around Qandahar, Afghanistan.

25. In or about the summer and fall of 2000, Nashiri and Mushin Musa Matwalli Atwah (a/k/a Abdul Rahman Al-Muhajir), tested explosives at a camp used by al Qaeda near Qandahar, Afghanistan.

26. In or about the summer of 2000, at the Madinat ash Sha'b location, Nashiri and Khamri and others repaired the boat and engine that had sunk in January 2000.

27. In or about July or August 2000 Nashiri, Khamri and others brought a white boat to the shores of Aden Harbor near the Al Burayqah bridge where they launched the boat into the water and conducted a test run of the boat through the harbor.

28. In or about September and October 2000, Jamal Ahmed Mohammed Ali al-Badawi (Badawi), enlisted and trained Fahd Mohammed Ahmed al-Quso (Quso), to film the attack on the USS COLE from the Tawahi apartment.

29. In or about September or October 2000, Badawi provided a pager to Quso.

30. In or about September or October 2000, Badawi advised Quso that Quso would receive on the pager a predetermined code that would indicate an imminent attack on the USS COLE and signal Quso to depart for the Tawahi apartment and film the attack.

31. In or about the morning of October 12, 2000, Nibras, Khamri, and others known and unknown, caused a white boat, laden with explosives, including trinitrotoluene (TNT) and cyclotrimethylenetrinitramine (RDX), to be towed by a truck from the Al-Burayqat Kud Al-Namer location to Aden Harbor in Aden, Yemen.

32. At or about 11:00 on the morning of October 12, 2000, Quso departed his residence in Aden for the Tawahi apartment.

33. At or about 11:00 on the morning of October 12, 2000, Nibras and Khamri boarded the white boat at the beach front of Aden Harbor and launched in the direction of the USS COLE, which was then berthed for refueling in Aden Harbor.

34. At or about 11:22 on the morning of October 12, 2000, as the USS COLE was refueling in Aden Harbor, Nibras and Khamri piloted the bomb-laden boat alongside the USS COLE at midship, offered friendly gestures to several crew members, and detonated the explosives, ripping a hole in the side of the USS COLE approximately 40 feet in diameter, killing seventeen crew members, and wounding forty-seven other crew members. Nibras and Khamri died in the attack.

35. Shortly after the bombing of the USS COLE, Badawi contacted Quso and asked him to retrieve and conceal the truck and trailer used to tow the attack boat, and which had been left behind by Nibras and Khamri in the vicinity of Aden Harbor.

36. In or about mid-October 2000, Usama Bin Laden, Saif al Adel, and others known and unknown met in Qandahar, Afghanistan and discussed the attack on the USS COLE.

37. In or about April 2001, while at one of Usama Bin Laden's guesthouses in Qandahar, Afghanistan, Nashiri apprised a bodyguard of Usama Bin Laden of the details of the attack on the USS COLE, identified the two suicide bombers as Nibras and Khamri, and indicated that Usama Bin Laden ordered the attack.

38. In or about the spring and summer of 2001, while at the al Farouq training camp in Afghanistan, Usama Bin Laden praised Nibras and Khamri for their successful suicide-murder mission against the USS COLE and exhorted the trainees at the camp to follow their example in future operations.

39. In or about the spring of 2001, Saif al Adel and others known and unknown, set out to produce an al Qaeda propaganda and recruitment video that included a re-enactment of the attack on the USS COLE.

40. In or about June 2001, Usama Bin Laden appeared in a video in which he praised the attack on the USS COLE.

41. Between in or about March 2001 and June 2002 Nashiri and others took steps to attack commercial shipping in the Straits of Hormuz or in the Gulf of Aden. Nashiri instructed others to purchase boats and navigational equipment with the intention of driving an explosive laden boat(s) into an oil tanker.

42. On or about October 6, 2002, in the Gulf of Aden, Yemen, a French supertanker *Limburg*, loaded with approximately 400,000 barrels of oil, was attacked by a bomb-laden boat, with the explosion resulting in: the death of a Bulgarian crew member; injury to twelve other crew members; and, approximately 90,000 barrels of oil spilled into the Gulf of Aden. Following the attack Al Qaeda and Usama Bin Laden acknowledged responsibility, and Al-Nashiri admitted he assisted with the plot.

Specification 2: In that 'Abd al-Rahim Hussein Muhammed Abdu AL-NASHIRI (a/k/a "Bilal" et. al; hereinafter Nashiri), a person subject to trial by military commission as an alien unlawful enemy combatant, did, from in or about 1996 through in or about 2002, in and around the Middle East, Arabian Peninsula, Yemen, Afghanistan, and other locations, join an enterprise of persons including but not limited to Usama Bin Laden, Ayman al Zawahiri, Mohammed Atef (a/k/a Abu Hafs al Masri), Saif al Adel, Mushin Musa Matwalli Atwah (a/k/a Abdul Rahman Al-Muhajir), Walid Muhammad Salih Mubarak Bin 'Attash (a/k/a Khallad), Jamal Ahmed Mohammed Ali al-Badawi, Fahd Mohammed Ahmed al-Quso, Wahib al-Khadher, Hassan Sa'id Awad al-Khamiri (a/k/a Hassan), Ibrahim al-Thawar (a/k/a Nibras), Taha Ibrahim Hussein al-Ahdal, Hadi Muhammad Salih al-Wirsh (a/k/a Hadi Dilkum), and other members and associates of the al Qaeda organization and its affiliated groups, known and unknown, with said enterprise of persons sharing a common criminal purpose to commit the following offenses triable by military commission: murder in violation of the law of war, treachery and perfidy, hijacking or hazarding a vessel or aircraft, destruction of property in violation of the law of war, intentionally causing serious bodily injury, attacking civilians, attacking civilian objects, and terrorism, the said Nashiri knew the unlawful purpose of the common criminal enterprise and joined willfully, that is with the intent to further the unlawful purpose of the enterprise and in order to accomplish some objective or purpose of the enterprise Nashiri and his co-conspirators knowingly committed certain overt acts, including, but not limited to

The Government hereby incorporates overt acts numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, and 42 listed in Charge I, Specification 1, as the overt acts committed by 'Abd al-Rahim Hussein Muhammed Abdu al-Nashiri (a/k/a "Bilal" et. al; hereinafter "Nashiri) and his co-conspirators in order to accomplish some objective or purpose of the enterprise.

CHARGE II: VIOLATION OF 10 U.S.C. § 950v(b)(15), MURDER IN VIOLATION OF THE LAW OF WAR

Specification: In that 'Abd al-Rahim Hussein Muhammed Abdu al-Nashiri (a/k/a "Bilal" et. al; hereinafter "Nashiri"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Aden, Yemen, on or about October 12, 2000, while in the context of and associated with armed conflict, intentionally and unlawfully kill seventeen persons and members of the United States Armed Forces, in violation of the law of war, by causing two men dressed in civilian clothing and operating a civilian vessel laden with explosives and detonating said boat-bomb alongside the United States Ship (U.S.S.) COLE, with said bombing resulting in the deaths of seventeen U.S. sailors; to wit: Kenneth E. Clodfelter, HT3, USN; Richard Costelow, ETC, USN; Lakeina M. Francis, MSSN, USN; Timothy L. Gauna, ITSN, USN; Cherone L. Gunn, SMSN, USN; James R. McDaniels, ITSN, USN; Marc I. Nieto, EN2, USN; Ronald S. Owens, EW3, USN; Labika N. Palmer, SN, USN; Joshua L. Parlett, ENFA, USN; Patrick H. Roy, FN, USN; Kevin S. Rux, EW2, USN; Ronchester M. Santiago, MS3, USN; Timothy L. Saunders, OS2, USN; Gary G. Swenchonis, Jr., FN, USN; Andrew Triplett, ENS, USN; and, Craig B. Wibberley, SN, USN.

CHARGE III: VIOLATION OF 10 U.S.C. § 950v(b)(17), USING TREACHERY OR PERFIDY

Specification: In that 'Abd al-Rahim Hussein Muhammed Abdu al-Nashiri (a/k/a "Bilal" et. al; hereinafter "Nashiri"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Aden, Yemen, on or about October 12, 2000, while in the context of and associated with armed conflict, after inviting the confidence or belief of one or more persons aboard the United States Ship (U.S.S.) COLE, including but not limited to: Joseph Anthony Huffman, FN, USN; and, Raymond Allen Mooney, GSFN, USN, that two men dressed in civilian clothing and operating a civilian vessel laden with explosives were entitled to protection under the law of war, and that the persons aboard the U.S.S. COLE were obliged to accord them protection under the law of war, and intending to betray that confidence or belief, did intentionally and unlawfully make use of that confidence and belief by causing the two men dressed in civilian clothing and operating a civilian vessel laden with explosives as an apparent garbage barge to detonate the said boat-bomb alongside the U.S.S. COLE , resulting in the deaths of seventeen, U.S. sailors of the United States Armed Forces, to wit: Kenneth E. Clodfelter, HT3, USN; Richard Costelow, ETC, USN; Lakeina M. Francis, MSSN, USN; Timothy L. Gauna, ITSN, USN; Cherone L. Gunn, SMSN, USN; James R. McDaniels, ITSN, USN; Marc I. Nieto, EN2, USN; Ronald S. Owens, EW3, USN; Labika N. Palmer, SN, USN; Joshua L. Parlett, ENFA, USN; Patrick H. Roy, FN, USN; Kevin S. Rux, EW2, USN;

Ronchester M. Santiago, MS3, USN; Timothy L. Saunders, OS2, USN; Gary G. Swenchonis, Jr., FN, USN; Andrew Triplett, ENS, USN; and, Craig B. Wibberley, SN, USN; and injury to forty-seven U.S. sailors of the United States Armed Forces. (See Charge Sheet Appendix A for a list of the forty-seven injured sailors.)

CHARGE IV: VIOLATION OF 10 U.S.C. § 950v(b)(16), DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR

Specification: In that 'Abd al-Rahim Hussein Muhammed Abdu al-Nashiri (a/k/a "Bilal" et. al; hereinafter "Nashiri"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Aden, Yemen, on or about October 12, 2000, while in the context of and associated with armed conflict, intentionally and unlawfully destroy property of the United States Government and its people, in violation of the law of war, by causing two men dressed in civilian clothing and operating a civilian vessel laden with explosives and said boat-bomb detonating alongside the United States Ship (U.S.S.) COLE, with said bombing resulting in the destruction of U.S. property.

CHARGE V: VIOLATION OF 10 U.S.C. § 950v(b)(13), INTENTIONALLY CAUSING SERIOUS BODILY INJURY

Specification: In that 'Abd al-Rahim Hussein Muhammed Abdu al-Nashiri (a/k/a "Bilal" et. al; hereinafter "Nashiri"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Aden, Yemen, on or about October 12, 2000, while in the context of and associated with armed conflict, intentionally and with unlawful force or violence cause serious injury to the body or health of forty-seven persons and members of the United States Armed Forces, in violation of the law of war, by causing two men dressed in civilian clothing and operating a civilian vessel laden with explosives and said boat-bomb detonating alongside the United States Ship (U.S.S.) COLE, with said bombing resulting in the deaths of seventeen U.S. sailors and serious bodily injury to forty-seven U.S. sailors; to wit: the names of the dead and injured contained in the specifications of charges II and III are realleged and incorporated as if fully set forth herein for Charge V and its specification. (See Charge Sheet Appendix A for a list of persons that suffered serious bodily injury in the attack of the U.S.S. COLE).

CHARGE VI: VIOLATION OF 10 U.S.C. § 950v(b)(24), TERRORISM

Specification: In that 'Abd al-Rahim Hussein Muhammed Abdu al-Nashiri (a/k/a "Bilal" et. al; hereinafter "Nashiri"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Aden, Yemen, on or about October 12, 2000, while in the context of and associated with armed conflict, engage in an act that evinced a wanton disregard for human life, in a manner calculated to influence or affect the conduct of the United States government by intimidation or coercion, by causing two men dressed in civilian clothing and operating a civilian vessel laden with explosives, and said boat-bomb detonating alongside the

United States Ship (U.S.S.) COLE, with said bombing resulting in the deaths of seventeen, and great bodily harm to forty-seven, U.S. sailors; to wit: the names of the dead and injured contained in the specifications of charges II and III are realleged and incorporated as if fully set forth herein for Charge VI and its specification.

CHARGE VII: VIOLATION OF 10 U.S.C. § 950v(b)(25), PROVIDING MATERIAL SUPPORT FOR TERRORISM

Specification 1: In that 'Abd al-Rahim Hussein Muhammed Abdu al-Nashiri (a/k/a "Bilal" et. al; hereinafter "Nashiri"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, from in or about 1996 through in or about 2002, in and around the Middle East, Arabian Peninsula, Yemen, Afghanistan, and other locations, while in the context of and associated with armed conflict, provide material support or resources including, but not limited to, property, service, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, personnel, including Nashiri himself, to be used in preparation for, or in carrying out, an act of terrorism that Nashiri knew or intended that the material support or resources were to be used for those purposes.

The Government also hereby incorporates overt acts numbered 1, 6, 7, 8, 9, 12, 13, 16, 17, 18, 19, 20, 22, 24, 25, 26, 27, 37, 41, and 42 listed in Charge I, Specification 1, as material support and resources provided by 'Abd al-Rahim Hussein Muhammed Abdu al-Nashiri (a/k/a "Bilal" et. al; hereinafter "Nashiri).

Specification 2: In that 'Abd al-Rahim Hussein Muhammed Abdu al-Nashiri (a/k/a "Bilal" et. al; hereinafter "Nashiri"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, from in or about 1996 through in or about 2002, in and around the Middle East, Arabian Peninsula, Yemen, Afghanistan, and other locations, while in the context of and associated with armed conflict, provide material support or resources, including, but not limited to, property, service, financial services, lodging, training, expert advice and assistance, safehouses, false documentation or identification, personnel, including Nashiri himself, to an international terrorist organization engaged in hostilities against the United States, to wit: al Qaeda, with the intent to provide such material support or resources to al Qaeda, and knowing that al Qaeda has engaged or engages in terrorism.

The Government also hereby incorporates overt acts numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, and 42 listed in Charge I, Specification 1, as material support and resources provided by 'Abd al-Rahim Hussein Muhammed Abdu al-Nashiri (a/k/a "Bilal" et. al; hereinafter "Nashiri).

CHARGE VIII: VIOLATION OF 10 U.S.C. § 950t, ATTEMPT TO COMMIT MURDER IN VIOLATION OF THE LAW OF WAR

Specification 1: In that 'Abd al-Rahim Hussein Muhammed Abdu al-Nashiri (a/k/a "Bilal" et. al; hereinafter "Nashiri"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Aden, Yemen, on or about January 3, 2000, while in the context of and associated with armed conflict, attempt to commit murder in violation of the law of war, by knowingly committing certain overt acts, including, but not limited to: renting a safehouse, buying a boat and explosives, assembling and launching a boat-bomb to explode alongside the United States Ship (U.S.S.) THE SULLIVANS, with the intent to kill the passengers aboard and around the ship including Commander E. Scott Hebner, USN, or other U.S. sailors or other persons around or aboard the USS THE SULLIVANS.

Specification 2: In that 'Abd al-Rahim Hussein Muhammed Abdu al-Nashiri (a/k/a "Bilal" et. al; hereinafter "Nashiri"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Aden, Yemen, on or about October 12, 2000, while in the context of and associated with armed conflict, attempt to commit murder in violation of the law of war, by knowingly committing certain overt acts, including, but not limited to: renting a safehouse, buying a boat and explosives, assembling and launching a boat-bomb to explode alongside the United States Ship (U.S.S.) COLE, with the intent to kill, to wit: Commander Kirk S. Lippold, USN, or other U.S. sailors or other persons around or aboard the USS COLE.

UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	**D-071** **GOVERNMENT'S RESPONSE** **To the Defense's Motion to Dismiss Charge I For Failure to State an Element of the Offenses in Violation of Due Process** 25 July 2008

1. Timeliness: This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 19 June 2008.

2. Relief Requested: The Government respectfully submits that the Defense's motion to dismiss charge I, murder in violation of the laws of war under 10 U.S.C. § 950v(b)(15) ("Mot. to Dismiss I"), should be denied.

3. Overview: The Defense, citing the recent Supreme Court decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), incorrectly argues that the accused, an alien unlawful enemy combatant, is entitled to the due process protections of the Fifth Amendment. In *Boumediene*, the Supreme Court addressed the narrow question of whether the Suspension Clause of the Constitution, art. I, § 9, cl. 2, applies to alien enemy combatants detained at Guantanamo Bay. The Supreme Court has made clear – in precedents that Boumediene did not question - that the individual rights provisions of the Constitution run only to aliens with a substantial connection to our country, and not to alien enemy combatants detained abroad.

Even if the accused were to possess constitutional rights under the 5th Amendment, the charge sheet complies with any due process requirements. The accused has been provided with adequate notice of the charged misconduct under any applicable standard. Rule for Military Commission (RMC) 307, similar to its Rule for Court-Martial counterpart, provides that a specification is sufficient if "it alleges every element of the charged offense expressly or by necessary implication." RMC 307(c)(3). Contrary to Defense claims, the charges more than adequately address notice requirements found in the MCA and MMC, or otherwise implicated by the 5th Amendment.

Despite a previously unsuccessful challenge of Charge I (See Ruling D008), the Defense seemingly attempts to re-litigate the issue in the instant motion. Unlawful or unprivileged combatants—such as Khadr—violate the laws of war when they commit war-like acts, such as murder. The CMCR emphasized that proposition by noting that unlawful combatants may be "treated as criminals under the domestic law of the capturing nation," ***including the Military Commissions Act***, "for any and all unlawful

combat actions." *Khadr*, CMCR 07-001, at 6. Defense suggestions that the accused participated in "conventional combat" are similarly misplaced. To be clear – the Government does not allege that the accused "merely took part in a conventional battle, during which he used a conventional weapon (a hand grenade) in response to a conventional assault by U.S. forces." Defense brief at 1. The firefight that precipitated the accused throwing a grenade resulting in the death of Sergeant First Class Speer began after Khadr and his co-conspirators opened fire at U.S. and coalition forces after coalition forces approached a compound where the accused and other unlawful combatants were making improvised explosive devices in order to target and kill U.S. forces while living amongst the civilian population, wearing civilian attire in order to conceal their participation in attacks against U.S. and coalition forces. The acts of the accused and his co-conspirators, including conducting surveillance in civilian attire, making and planting IEDs in civilian attire, and attacking U.S. forces, all violate the law of war and are properly before the military commission. Absent combatant immunity, which the accused surely cannot claim, the acts themselves committed by accused are in violation of the law of war.

4. Burden and Persuasion: To the extent the Defense attempts to equate Khadr's murderous actions with those of a lawful combatant, the Defense bears the burden of proving that he is entitled to lawful combatant immunity. *See United States v. Khadr*, CMCR 07-001, at 7 (Sept. 24, 2007). Furthermore, and contrary to paragraph 4 of the Defense Motion, this issue is not "jurisdictional in nature." In the present motion, the Defense does not allege that the Commission lacks jurisdiction to try this offense. Therefore, this is a question of law which the Defense must prove by a preponderance of the evidence. *See* Rule for Military Commissions ("RMC") 905(c)(2)(A).

5. Facts:

a. From as early as 1996 through 2001, the accused traveled with his family throughout Afghanistan and Pakistan. During this period, he paid numerous visits to and at times lived at Usama bin Laden's compound in Jalalabad, Afghanistan. While traveling with his father, the accused saw and personally met many senior al Qaeda leaders including, Usama bin Laden, Doctor Ayman al Zawahiri, Muhammad Atef, and Saif al Adel. The accused also visited various al Qaeda training camps and guest houses. *See* AE 17, attachment 2.

b. On 11 September 2001, members of the al Qaeda terrorist organization executed one of the worst terrorist attacks in history against the United States. Terrorists from that organization hijacked commercial airliners and used them as missiles to attack prominent American targets. The attacks resulted in the loss of nearly 3,000 lives, the destruction of hundreds of millions of dollars in property, and severe damage to the American economy. *See The 9/11 Commission Report,* FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 4-14 (2004).

c. After al Qaeda's terrorist attacks on 11 September 2001, the accused received training from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives. *See* AE 17, attachment 3.

d. Following this training the accused received an additional month of training on landmines. Soon thereafter, he joined a group of al Qaeda operatives and converted landmines into improvised explosive devices ("IEDs") capable of remote detonation.

e. In or about June 2002, the accused conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

f. In or about July 2002, the accused planted improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

g. On or about 27 July 2002, U.S. forces captured the accused after a firefight at a compound near Khost, Afghanistan. *See* AE 17, attachment 4.

h. Before the firefight had begun, U.S. forces approached the compound and asked the accused and the other occupants to surrender. *See id.*, attachment 5.

i. The accused and three other individuals decided not to surrender and instead "vowed to die fighting." *Id.*

j. After vowing to die fighting, the accused armed himself with an AK-47 assault rifle, put on an ammunition vest, and took a position by a window in the compound. *Id.*

k. Near the end of the firefight, the accused threw a grenade that killed Sergeant First Class Christopher Speer. *See id.*, attachment 6. American forces subsequently shot and wounded the accused. After his capture, American medics administered life-saving medical treatment to the accused.

l. Approximately one month later, U.S. forces discovered a videotape at the compound where the accused was captured. The videotape shows the accused and other al Qaeda operatives constructing and planting improvised explosive devices while wearing civilian attire. *See id.*, attachment 4.

m. During an interview on 5 November 2002, the accused described what he and the other al Qaeda operatives were doing in the video. *Id.*, attachment 1.

n. When asked on 17 September 2002 why he helped the men construct the explosives, the accused responded "to kill U.S. forces." *Id.*, attachment 6.

o. The accused related during the same interview that he had been told the U.S. wanted to go to war against Islam. And for that reason he assisted in building and deploying the explosives, and later he threw a grenade at an American. *Id.*

p. During an interrogation on 4 December 2002, the accused agreed that his use of land mines as roadside bombs against American forces was also of a terrorist nature and that he is a terrorist trained by al Qaeda. *Id.*, attachment 3.

q. The accused further related that he had been told about a $1,500 reward being placed on the head of each American killed, and when asked how he felt about the reward system, he replied: "I wanted to kill a lot of American[s] to get lots of money." *Id.*, attachment 8. During a 16 December 2002 interview, the accused stated that a "jihad" is occurring in Afghanistan, and if non-believers enter a Muslim country, then every Muslim in the world should fight the non-believers. *Id.*, attachment 9.

r. The accused was designated as an enemy combatant as a result of a Combatant Status Review Tribunal ("CSRT") conducted on 7 September 2004. *See* AE 11. The CSRT also found that the accused was a member of, or affiliated with, al Qaeda. *Id.*

s. On 5 April 2007, charges of Murder in violation of the law of war, Attempted Murder in violation of the law of war, Conspiracy, Providing Material Support for Terrorism and Spying were sworn against the accused. After receiving the Legal Adviser's formal "Pretrial Advice" that Khadr is an "unlawful enemy combatant" and thus that the military commission had jurisdiction to try the accused, those charges were referred for trial by military commission on 24 April 2007.

6. Discussion:

a. An alien enemy combatant, such as the accused, who has been charged under the MCA, has no rights under the Fair Notice provision of the Fifth Amendment.

i. The accused, an alien unlawful enemy combatant, argues that he is entitled to the due process protections of the Fifth Amendment. Included among those protections is the right to fair notice of the offenses with which he is charged. This right, however, does not extend to alien enemy combatants, such as the accused, who are detained at Guantanamo Bay, Cuba, to be tried for war crimes and other offenses codified in the MCA.

ii. In *Boumediene*, the Supreme Court addressed a narrow question – whether the Suspension Clause of the Constitution, art. I, § 9, cl. 2, applies to alien enemy combatants detained at Guantanamo Bay, who are being held based solely upon the determination of a Combatant Status Review Tribunal. The Court concluded that uncharged enemy combatants at Guantanamo Bay must, after some period of time, be afforded the right to challenge their detention through habeas corpus. In reaching that conclusion, the Court considered both the historical reaches of the writ of habeas corpus, *see id.* at 2244-51, and the "adequacy of the process" that the petitioners had received. The Court signaled no intention of extending the individual rights protections of the Constitution to alien enemy combatants tried by military commission.

iii. To the contrary, the Court emphasized that "[i]t bears repeating that our opinion does not address the content of the law that governs petitioners' detention." *Boumediene*, 128 S. Ct. at 2240; *see also id.* at 2277. The Court emphasized that the petitioners in that case had been held for over six years without ever receiving a hearing

before a judge, *see id.* at 2275, and the Court specifically contrasted the circumstances of the petitioners with the enemy combatants in *Quirin* and *Yamashita* who had received a trial before a military commission (albeit under procedures far more circumscribed than those applying here). The Court noted that it would be entirely appropriate for "habeas corpus review...to be more circumscribed" – if the court were in the posture of reviewing, not the detention of uncharged enemy combatants, but those who had held a hearing before a judgment of a military commission "involving enemy aliens for war crimes." *See id.* at 2270-71.

iv. *Boumediene* thus was a decision concerning the separation of powers under the Constitution and the role that the courts may play, under the unique circumstances of the detentions at Guantanamo Bay, in providing for the judicial review of the detention of individuals who had not received any adversarial hearing before a court or military commission. *See Boumediene*, 128 S. Ct. at 2259 ("[T]he writ of habeas corpus is itself an indispensible mechanism for monitoring the separation of powers."). In considering whether the Suspension Clause would apply, *Boumediene* articulated a multi-factored test of which the first factor required consideration of "the detainees' citizenship and status and the adequacy of the process through which status was determined." *See id.* at 2237. In this case, there is no dispute that Khadr is an alien, and he is being tried before a military commission established by an Act of Congress and with the panoply of rights secured by the MCA. Khadr's status as an alien unlawful enemy combatant has not been challenged by the accused. *See U.S. v. Khadr*, Transcript of RMC 803 Session, 8 November 2007, at 81. According to the Commission, personal jurisdiction over the accused exists, meaning the accused is considered an alien unlawful enemy combatant, until that status is challenged. *Id.* at 90; *see also U.S. v. Khadr*, USCMCR 07-001 (Sept. 24, 2007) ("We find that this facial compliance by the Government with all the pre-referral criteria contained in the Rules for Military Commissions, combined with an unambiguous allegation in the pleadings that Mr. Khadr is "a person subject to trial by military commission as an alien unlawful enemy combatant," entitled the military commission to initially and properly exercise *prima facie* personal jurisdiction over the accused."). *Id.* at 21. Moreover, the accused will have the opportunity to challenge his status – if he raises the issue – at trial. Thus, *Boumediene* does not even provide the accused with any rights under the Suspension Clause. It goes without saying that he may not lay claim to any of the other individual rights secured by the Constitution.

v. Indeed, even if the accused could claim an entitlement under *Boumediene* to rights under the Suspension Clause, the Supreme Court's decision did not, in any terms, upset the well-established holding, recognized previously by the Commission, that the Fifth Amendment and other individual rights principles of the Constitution do not apply to alien enemy combatants lacking any voluntary connection to the United States. *See U.S. v. Khadr*, D-014, Ruling on Defense Motion to Dismiss for Lack of Jurisdiction (Equal Protection), at 2, para. 7-8 ("[M]ilitary commissions are not subject to the requirements of the Fifth Amendment."). The Supreme Court has recognized that the writ of habeas corpus historically has had an "extraordinary territorial ambit." *See Rasul v. Bush*, 542 U.S. 466, 482 n. 12 (2004). By contrast, the Court has made clear – in precedents that *Boumediene* did not question – that the individual rights provisions of the

Constitution run only to aliens with a substantial connection to our country and not to alien enemy combatants detained abroad. *See United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *see also Johnson v. Eisentrager*, 339 U.S. 763 (1950) (finding "no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses").

vi. Even when an alien is found within United States territory (as was the nonresident alien in *Verdugo-Urquidez*) the degree to which constitutional protections apply depends on whether the alien has developed substantial voluntary contacts with the United States. 494 U.S. at 271. The accused's contacts with the United States, which consist of unlawfully killing a U.S. Soldier in the course of unlawfully waging war against the nation and being detained at a U.S. military base, "is not the sort to indicate any substantial connection with our country." *Id.*; *see Eisentrager*, 339 U.S. at 783 (finding "no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses"). As the *Eisentrager* Court explained, "[i]f [the Fifth] Amendment invests enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own soldiers" because "American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to discipline, including military trials for offenses against aliens or Americans." *Id.*

vii. *Boumediene*'s holding was premised on the unique role of habeas corpus in policing the separation of powers in our constitutional system, *see Boumediene*, 128 S. Ct. at 2259, and on a factual difference between *Eisentrager*'s petitioners and those in *Boumediene*: the former did not contest their status as enemy combatants; the latter did so contest their status and thus required a remedy in habeas. *See id.* Nothing in *Boumediene*, however, casts doubt on *Eisentrager*'s well-established (and subsequently applied) denial that the Constitution applies *in toto* to nonreseident aliens. *Boumediene* certainly does not extend the Constitution's individual-rights protections, contrary to *Eisentrager*, *Verdugo-Urquidez* and other cases, to alien unlawful enemy combatants before congressionally-constituted military commissions. To paraphrase the *Boumediene* Court itself, "if the [petitioner's] reading of [*Boumediene*] were correct, the opinion would have marked not only a change in, but a complete repudiation of" long-standing precedent. *Id.* at 2258. Because the Supreme Court did not disturb those holdings in *Boumediene*, they remain binding precedent before this Commission. As the Court explained in *Agostini v. Felton*, 521 U.S. 203 (1997), "if a precedent of this Court has direct application in a case, yet appears to rest on reason rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 237-38 (quotation omitted). Thus, the recognition that *Boumediene* did not overrule those cases is sufficient in and of itself to deny the accused's requested relief.

viii. Contrary to *Agostini*, the accused would read *Boumediene* as, *sub silentio*, overruling the Court's existing precedents and providing a two-part test – found nowhere in *Boumediene* – for the analysis of *other* constitutional rights. It is clear, however, that the test enunciated by the Court to determine whether the Suspension Clause applied to

the *Boumediene*-petitioners was specifically geared to measuring whether the Suspension Clause – and not any other constitutional provision – applies to those petitioners. *See id.* at 2237. That three-part test was clearly intended by the Court only to resolve the limited and narrow issue before it, and is therefore inapposite to the question of whether other portions of the Constitution apply to alien detainees at Guantanamo.

ix. Even so, under that functional analysis endorsed in *Boumediene* for purposes of the Suspension Clause, it is clear that enemy aliens abroad do not come within the protection of the Fifth Amendment. The Government has broad latitude when it operates in the international sphere, where the need to protect the national security and conduct our foreign relations is paramount. *See Haig v. Agee*, 454 U.S. 280, 292, 307-308 (1981); *see also Palestine Information Office v. Schultz*, 853 F.2d 932, 937 (D.C. Cir. 1988) (holding that, in applying constitutional scrutiny to challenged Executive action within the United States, court must give particular deference to political branches' evaluation of our interests in the realm of foreign relation and selection of means to further those interests). In the international arena, distinctions based on alienage are commonplace in the conduct of foreign affairs. *See, e.g., DKT Memorial Fund, Inc. v. Agency for International Development*, 887 F.2d 275, 290-291 (D.C. Cir. 1989) (recognizing that the government speaks in the international sphere "not only with its words and its funds, but also with its associations"). Drawing a distinction between aliens abroad, on the one hand, and those who make up part of our political community, on the other hand, is a basic feature of sovereignty. *See Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982); *Foley v. Connelie*, 435 U.S. 291 (1978); *cf. Mathews v. Diaz*, 426 U.S. 67, 80, 85 (1976) (recognizing that it is "a routine and normally legitimate part" of the business of the Federal Government to classify on the basis of alien status and to "take into account the character of the relationship between the alien and this country"). In this context, application of the Fifth Amendment to limit the political branches' treatment of aliens abroad would improperly interfere with those branches' implementation of our foreign policy and their ability to successfully prosecute a foreign war.

b. Even if the accused were to possess constitutional rights under the Fifth Amendment, the charge sheet fully complies with any fair notice requirements.

i. The accused has been provided with adequate notice of the charged misconduct under any applicable standard. The standard for determining whether a specification states an offense is whether the specification alleges "every element . . . either expressly or by necessary implication, so as to give the accused notice and protect him against double jeopardy . . . . This is a three-prong test requiring (1) the essential elements of the offense, (2) notice of the charge, and (3) protection against double jeopardy." *United States v. Dear*, 40 M.J. 196, 197 (1994) (quoting in part R.C.M. 307(c)(3)).

ii. Similar to the Rules for Courts-Martial, Rule for Military Commission 307 outlines the proper swearing of charges. R.M.C. 307(c)(3) requires that a specification be a "plain, concise, and definite statement of the essential facts constituting the offense

charged. **A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication.**" *Id.* (Emphasis added.) Here, the specification in Charge I includes the elements of Murder in violation of the law of war as provided in both the MCA and MMC.

iii. The MCA defines Murder in violation of the law of war as:

> Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, *in violation of the law of war* shall be punished by death or such other punishment as a military commission under this chapter may direct.

§ 950v(b)(15) (emphasis added). The MMC provides the following elements for Murder in violation of the law of war:

> 1) One or more persons are dead;
> 2) The death of the persons resulted from the actor omission of the accused;
> 3) The killing was unlawful;
> 4) The accused intended to kill the person or persons;
> 5) The killing was *in violation of the law of war*; and
> 6) The killing took place in the context of and was associated with an armed conflict.

MMC, Part IV, para.6(a)(15) (emphasis added). The specification to Charge I includes each of these elements:

> In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, on or about July 27, 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, unlawfully and intentionally murder U.S. Army Sergeant First Class Christopher Speer, in violation of the law of war, by throwing a hand grenade at U.S. forces resulting in the death of Sergeant First Class Speer.

U.S. v. Khadr, Referred Charge Sheet, 24 April 2007, at 3 ("Charge Sheet"). On its face, the specification gives sufficient notice to the accused under the *Dears* test. First, every element of the offense in the MCA and MMC are present in the specification of Charge I, including "in violation of the law of war." Second, the accused was provided notice of the charged offense when he was given a copy of the charge sheet shortly after the initial swearing of charges. Furthermore, that the accused is properly categorized as an alien unlawful enemy combatant without enjoying combatant immunity necessarily provided him notice that the killing of a lawful combatant would be in violation of the law of war. To the extent the third prong is relevant today, it has been satisfied through the record. *See Dear*, 40 M.J. 197.

iv. The accused's comparison of customary law and the military customs enforceable under UCMJ articles 133 and 134 is misplaced. In fact, the cases cited by the accused support the Government position that the elements of Charge I give sufficient

notice of the criminality of the underlying conduct. For instance, in both *United State v. Brice*, 38 C.M.R. 134, 137 (C.M.A. 1967) and *United States v. Acosta*, 41 C.M.R. 341, 343 (C.M.A. 1970), the U.S. Court of Military Appeals required an element of criminality in the specification when "the act charged does not of itself constitute criminal conduct." *Brice*, 38 C.M.R. at 340 (citing *United States v. Julius*, 25 C.M.R. 27 (C.M.A. 1957)).

v. Indeed, the language "in violation of the law of war" and "unlawfully" provide notice of the criminality of the accused's charged misconduct. Charge Sheet at 3. As the accused recognizes, killing during a "conventional conflict" is not unlawful so long as it is between lawful combatants who are not *hors de combat*. Def. Motion at 14. But the accused is charged with the "unlawful" murder of SFC Christopher Speer as an "alien unlawful enemy combatant" who does not benefit from "combatant immunity." *See* Charge Sheet at 3. That he did not enjoy the combatant's privilege is sufficient notice that the killing was "in violation of the law of war." The criminality of the alleged offense could not be more explicit. The Military Judge affirmed the criminality of this offense in the Commission's ruling on D-008, which states in part: "There was a reasonable basis for Congress, in 2006, to determine that the offense of murder in violation of the law of war was punishable by military commissions, before, on, and after 11 September 2001." *See U.S. v. Khadr*, D-008, Ruling on Defense Motion to Dismiss Charge One for Failure to State an Offense and for Lack of Subject Matter Jurisdiction, 21 April 2008, at 3, para. 7.

vi. Even so, there exists a significant distinction between violations of "military custom" as criminalized under UCMJ articles 133 and 134 and violations of the customary laws of war. As discussed in greater detail below, Congress and the Secretary of Defense were acting under their constitutional authority when defining what acts are "in violation of the law of war." Even so, this offense has been a part of the customary laws of war for centuries.

c. Congress was acting within its constitutional authority when it included "in violation of the law of war" as a statutory element to Murder in violation of the law of war in the MCA.

i. The Commission need not reach the issue of customary international law since the MCA defines the offense Murder in violation of the law of war. The Constitution vests Congress with the exclusive authority "[t]o *define* and *punish* . . . Offenses against the Law of Nations." U.S. Const. Art. I, § 8, cl. 10 (emphasis added). Exercising that authority in the Military Commissions Act of 2006 ("MCA"), Congress unequivocally declared murder in violation of the law of war to be a crime triable and punishable by military commissions.

ii. The MCA codifies "offenses that have traditionally been triable by military commissions." 10 U.S.C. § 950p(a). One such offense, triable by a military commission, is murder committed in violation of the law of war. *See id.* § 950v(b)(15), 950t.

iii. The accused argues that the Government failed to give notice by including the element "in violation of the law of war" as provided in MCA § 950v(b)(15). Rather than attempt to criminalize unprivileged belligerency or collapse two elements, as the accused suggests, Congress placed this language squarely in the statutory elements. Congress did not criminalize "unprivileged belligerency" per se, but it certainly had the constitutional authority to define killing by an unlawful combatant as a violation of the law of war.

iv. As the accused concedes, Khadr has been properly charged (**and fair notice therefore exists**) under Part IV of the Manual for Military Commissions ("MMC"). *See U.S. v. Khadr*, D-008, Def. Mot. to Dismiss Charge I at 7. The MMC is entirely consistent with the MCA, and the accused's motion therefore should be denied.

d. Killing by an unlawful combatant is a violation of the law of war.

i. The accused claims that he was denied fair notice that killing by an unlawful combatant is "in violation of the law of war." The argument rests in part on the theory that this was not a customary international law violation. As previously indicated in the Commission's ruling on D-063, "[b]y passing the MCA, Congress made the provisions of the MCA superior to prior statutes, treaties, and customary international law under the last in time rule." *See* D-063, Ruling on Defense Motion to Suppress Out-of-Court Statements by the Accused due to Coercive Interrogation, at 2, para. 2d. Nevertheless, there can be little doubt that killing by an unlawful combatant is in fact a violation of the law of war.

ii. The MCA reflects Congress's exercise of its authority to "define and punish" murder as one of the "Offenses against the Law of Nations." U.S. Const. Art. I, § 8, cl. 10. Congress's judgment is firmly rooted in U.S. law and international law and custom, both of which recognize that a combatant commits murder when he kills another person in a manner that is not sanctioned by the laws of war.

iii. The accused concedes, *see* D-008, Def. Mot. to Dismiss Charge I at 3-5, that killing through "prohibited means" constitutes a violation of the law of war. One of those "prohibited means"—which is as old as the law of war itself—is murder committed by a combatant who fails to fight as a lawful belligerent.[1] As Justice Iredell noted in 1795, "hostility committed without public authority" is "not merely an offence against the nation of the individual committing the injury, *but also against the law of*

[1] The accused has previously argued—notably, without citation—that the law of war does not recognize "status crimes." D-008, Def. Mot. to Dismiss Charge I at 5. The Supreme Court, however, has held that the distinction between "lawful" and "unlawful" combatant status is founded in the "universal agreement of law and practice" under the law of war. *Ex parte Quirin*, 317 U.S. 1, 30 (1942). And unlawful combatants can be forced to stand trial before military commissions for *precisely* those "acts which render their belligerency unlawful." *Id.* Moreover, the Government did not criminally charge Khadr simply on the basis of his "status"; rather, he is charged with *committing murder* while maintaining the status of an unlawful enemy combatant.

nations . . . ." *Talbot v. Janson*, 3 U.S. 133 (1795) (Iredell, J., concurring) (emphasis added).[2]

iv. Individuals "who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment." U.S. Army Field Manual No. 27-10, Article 80, 18 July 1956 (citation omitted). *See also id.*, Articles 81, 82. Historically, summary execution of those caught committing acts of unlawful belligerency, sometimes termed "unlawful combatants" or "unprivileged belligerents," has not been uncommon. *See, e.g., United States v. List* ("Hostage Case"), 11 Trials of War Criminals 1223 (GPO 1950).

v. Colonel Winthrop, in a treatise that the Supreme Court has called the "the Blackstone of Military Law," *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2777 (2006), noted:

> Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished even with death.

Winthrop, *Military Law and Precedents*, 783 (1895, 2d ed. 1920). During the Civil War, military commissions were used frequently to try and punish unlawful combatants "who engaged in the killing . . . of peaceable citizens *or soldiers*." *Id.* at 784 (emphasis added). Critically for purposes of this motion, many were sentenced to death "for homicide." *Id.* at 784 n.57. *See also id.* at 839 (emphasizing that murder was one of the crimes "most frequently brought to trial before military commissions" during the Civil War).

vi. The historical roots of this violation of the law of war are undeniable. Unlike lawful combatants, "[T]hose, on the contrary, who, not being so authorized, take upon them to attack the enemy, are treated by him as banditti; and even the state to which they belong ought to punish them as such." Leslie C. Green, The Contemporary Law of Armed Conflict 2nd Edition 104 (Manchester University Press 2000) (citing 7 Von Martens, A Compendium of the Law of Nations 1788, ch. III, s. 2 (tr., Cobbett, 1802, 287)). Similarly, in a 142-year-old opinion, which remains binding on the Executive Branch, the Attorney General emphasized that "[a] bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war." 11 Op. Atty. Gen. 297, 314 (1865).

vii. Lieber's Code, General Order No. 100 War Department, April 24, 1863, recognized the distinction between lawful and unlawful combatants as well. Under

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[2] Offenses committed by unprivileged – in essence, Stateless – belligerents are undeniably the modern day analogy to piracy. The accused's reference to the four words "on the high seas" omitted from the *Talbot* quote is inconsequential. *See* D-071, Def. Motion at 9 n. 3.

Article 57, "[s]o soon as a man is armed by a sovereign government, and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses." By contrast, those who "commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army . . . shall be treated summarily as highway robbers or pirates." Article 82.

viii. Given that unlawful belligerents historically could be summarily punished—and even executed—under the law of war, it follows *a fortiori* that they are on notice that killing in the context of an armed conflict is "in violation of the laws of war." Thus, the Supreme Court has held:

> By universal agreement and practice the law of war draws a distinction between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. *Unlawful combatants* are likewise subject to capture and detention, but in addition they are *subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.*

Ex parte Quirin, 317 U.S. 1, 30 (1942) (emphasis added).

ix. Here, Khadr has been charged for committing murder without combatant immunity and in violation of the law of war. Specifically, Khadr unlawfully engaged in combat by fighting outside of responsible command, by fighting without wearing a distinctive emblem, by failing to carry his arms openly, and by flaunting the laws and customs of war by feigning to be a non-combatant. *Compare* Hague Regulations, Annex, Art. 1.

x. Under the law of armed conflict, only a lawful combatant enjoys "combatant immunity" or "belligerent privilege" for the lawful conduct of hostilities during armed conflict. *See, e.g., Padilla v. Bush*, 233 F.Supp.2d 564, 592 (S.D.N.Y 2002), *rev'd on other grounds*, 542 U.S. 426 (2004). Those considered "lawful combatants" under the law cannot be prosecuted for belligerent acts—including the killing of an enemy soldier—if they abide by the law of armed conflict. *See id.* at 592 (*citing United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002)).

xi. Khadr bears the burden of proving that he is entitled to combatant immunity. *See U.S. v. Khadr*, CMCR 07-001, at 7 (Sept. 24, 2007) ("The burden of raising the special defense that one is entitled to lawful combatant immunity rests upon the individual asserting the claim."). Here, Khadr has not challenged the *prima facie* evidence that he is an unlawful combatant, *see* D-008, Def. Mot. to Dismiss Charge I at 5 n.11, much less has he proven that he is entitled to combatant immunity. *See also U.S. v. Khadr*, Transcript of RMC 803 Session, 8 November 2007, at 81.

xii. Unlawful or unprivileged combatants—such as Khadr—violate the laws of

war when they commit war-like acts, such as murder. The CMCR emphasized that proposition by noting that unlawful combatants may be "treated as criminals under the domestic law of the capturing nation," ***including the Military Commissions Act***, "for any and all unlawful combat actions." *Khadr*, CMCR 07-001, at 6. The CMCR reiterated the permissibility of Khadr's trial before military commission by citing passages from *Lindh* and *Quirin*, both of which emphasize that "'*[u]nlawful combatants are . . . subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.*'" *Khadr*, CMCR 07-001, at 6 (quoting *Quirin*, 317 U.S. at 30, and citing *Lindh*, 212 F. Supp. 2d at 554, the latter of which block-quoted the same language from *Quirin*). *See also U.S. v. Khadr*, Ruling on D-008 (quoting *Quirin* throughout).

xiii. Even for otherwise lawful combatants (which Khadr is not), one example of murder in violation of the law of war is the "treacherous[]" killing of "individuals belonging to the hostile nation or army." Annex to Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907, Art. 23, ¶ 3 ("Hague Regulations"). Such killings have long been held to violate the laws of war, including under the Fourth Hague Convention, and they have violated the War Crimes Act since 1997, *see* Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1998, Pub. L. 105-118, § 583, 111 Stat. 2386, 2436 (Nov. 26, 1997), long before Khadr treacherously killed Sergeant First Class Speer.

xiv. For example, Article 37(1)(c) of Additional Protocol I to the Geneva Conventions prohibits killing through "perfidy," including the murder of an adversary by an individual "feigning . . . civilian, non-combatant status." Although the United States has not ratified Protocol I, it views the perfidy provisions of Article 37 as reflecting customary international law. *See U.S. Army Operational Law Handbook* 15, 25 (J. Rawcliffe & J. Smith eds., 2006).

xv. The Army's *Operational Law Handbook* similarly defines unlawful combatants to include "civilians who are participating in the hostilities or who otherwise engage in unauthorized attacks or other combatant acts." *Id.* at 17.

xvi. The Judge Advocate General's *Law of War Handbook* also emphasizes that attacking a soldier while feigning non-combatant status constitutes a war crime. *See* Int'l & Operational Law Department, *Law of War Handbook*, § 5(A)(2)(f), at 192 (Keith E. Puls et al. eds., 2005) ("Attacking enemy forces while posing as a [non-combatant] civilian puts all civilians at hazard.") (internal quotation marks and citations omitted).

xvii. Similarly, U.S. Air Force Pamphlet 110-31 prohibits "[p]erfidy or treachery," which includes murder by a combatant who "feign[s] . . . civilian, noncombatant status." U.S. Air Force Pamphlet 110-31, at 5-12.

xviii. Building on these and other materials, Article 8(2)(b)(xi) of the Rome Statute of the International Criminal Court similarly prohibits "killing or wounding treacherously individuals belonging to the hostile nation or enemy." *See also* Knut Dörmann, *Elements of War Crimes* 240-45 (2002).

xix. These sources establish an irrefutable consensus, as a matter of United States and international law, that murder committed by an individual—like Khadr—who takes up arms without satisfying the conditions for lawful combat is a violation of the law of war. He was therefore appropriately charged, and he had sufficient notice of the element, the "in violation of the law of war."

e. Conclusion

i. The Defense motion should be denied. The accused is not entitled to the due process protections of the Fifth Amendment. The Supreme Court has made clear that the individual rights provisions of the Constitution run only to aliens with a substantial connection to our country, and not to alien enemy combatants detained abroad, such as Khadr.

ii. Even if the accused were to possess constitutional rights under the 5th Amendment, the charge sheet complies with any due process requirements. The accused has been provided with adequate notice of the charged misconduct under any applicable standard. Contrary to Defense claims, the charges more than adequately address notice requirements found in the MCA and MMC, or otherwise provided by the 5th Amendment.

iii. Finally, the Defense reiterates the same arguments that were rightly rejected by the Military Judge in his ruling on D008. The Defense argues that the essential requirements for lawful combat do nothing to alter the permissibility of a combatant's hostile actions. Rather, in the Defense's view, anyone can kill an American serviceman under any battlefield circumstances, so long as he does not use certain narrowly proscribed methods, which (conveniently enough for Khadr) do not include terrorism. Unlawful or unprivileged combatants—such as Khadr—violate the laws of war when they commit war-like acts, such as murder. Absent combatant immunity, which the accused surely cannot claim, the acts themselves committed by accused are in violation of the law of war. The Defense's argument to the contrary relies upon egregious misunderstandings and misinterpretations, under which the law of war somehow protects killing by terrorists, like Khadr, who openly flaunt every convention, norm, custom, and rule that has ever governed the conduct of warfare in the history of the civilized world. The charge of murder as alleged against Khadr is a cognizable war crime, which is properly heard before this Court.

7. Oral Argument: The Government does not believe oral argument is necessary to deny the Defense motion. To the extent, however, that the Military Judge orders the parties to present oral argument, the Government will be prepared to do so.

8. Witnesses and Evidence: All of the evidence and testimony necessary to deny this motion is already in the record.

9. Certificate of Conference: Not applicable.

10. Additional Information: None.

11. <u>Submitted by</u>:

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UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

D-071

Defense Reply to Government Response to Motion to Dismiss Charge I For Failure to State an Element of the Offense in Violation of Due Process

11 August 2008

1. Timeliness: This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the Military Judge's 19 June 2008 scheduling order.

2. Reply: THE GOVERNMENT HAS VIOLATED DUE PROCESS BY FAILING TO SPECIFY ALL THE ELEMENTS OF THE OFFENSE OF MURDER IN VIOLATION OF THE LAW OF WAR

a. In response to the defense motion to dismiss for breaching Mr. Khadr's due process right to fair notice of the charges against him, the government proffers three arguments. The first is that Mr. Khadr has no due process rights. The second is that even if Charge I is impermissibly vague, trial counsel's motions practice has adequately clarified the approximate parameters of the elements it must prove at trial. The third is that Charge I adequately alleges at least one violation of the law of war (which the government contends is either "unprivileged belligerency" and/or perfidy). Each of these arguments fail.

b. The United States cannot conduct a trial that does not comply with Constitutional due process in an area where the United States is *de facto* sovereign.

(1) The government contends that the Supreme Court in *Boumediene* made no ruling with respect to the extraterritorial application of the Constitution. Rather, the government contends *Boumediene* decided only the "narrow" question of the Suspension Clause's reach. (Govt. Br. at para. 6(a)(ii).) This is patently incorrect. The core of the *Boumediene* holding is that even if GTMO is technically Cuban territory, the government cannot treat it as a law-free zone. The Constitution is not a matter of political grace. *See Boumediene v. Bush*, 128 S.Ct. 2229, 2254 (2008) ("[T]he Constitution has independent force in these territories, a force not contingent upon acts of legislative grace.").

(2) To evade *Boumediene*, trial counsel relies upon two cases that it claims are both controlling and undisturbed – *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). *Eisentrager* dealt with German prisoners who had been tried by military commission and held in a military prison in occupied Germany after WWII. *Verdugo* dealt with a warrantless search conducted by U.S. law enforcement in Mexico. In both of these cases, the Court held that what U.S. officials did in a foreign country implicated the relations between the United States and that foreign government. Accordingly, the U.S.

Constitution did not supplant that countries' local law unless the individuals involved had some other significant connection to the United States that would warrant it.[1]

(i) *Boumediene* held, however, that the "*de jure* sovereignty" Cuba ostensibly exercises over GTMO as a function of its lease with the United States is sovereignty in name only – a finding the government failed to address. For all practical purposes, the United States has exercised "*de facto* sovereignty" over GTMO ever since it was taken over from the Spanish in 1898, along with Puerto Rico, Guam, the Mariana Islands and all of the other, so called, "unincorporated territories." *Boumediene*, 128 S.Ct. at 2253.

(ii) The result was that because the government can, and does, treat GTMO as if it were U.S. soil, it cannot take the position that GTMO is foreign soil when it comes to the Constitution. Because unlike Germany and Mexico, there is no local law in GTMO. A ring of landmines around GTMO is one of many steps taken to ensure that Cuban law does not apply. *Boumediene*, 128 S.Ct. at 2261. There is no conflict between the Constitution and foreign law. There is a choice between the Constitution and no law at all.

(iii) *Boumediene* therefore distinguished *Eisentrager* and *Verdugo* because the Constitution does not allow such a vacuum, even if it appears to be the formal consequence of a lease. "Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply." *Boumediene*, 128 S.Ct. at 2259; *see also id*. at 2260 ("The Court's holding in *Eisentrager* was thus consistent with the Insular Cases, where it had held there was no need to extend full constitutional protections to territories the United States did not intend to govern indefinitely. Guantanamo Bay, on the other hand, is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.").

(3) While *Boumediene* reserved judgment on the full breadth of the Constitution's application in GTMO, there can be no question that its territorial status and the alienage of the individuals held there are not dispositive or even compelling factors. *Boumediene*, 128 S.Ct. at 2256. And the government's argument that voluntary contacts with the United States are a prerequisite for application of the Constitution, (Govt. Br. at para. 6(a)(v)-(vi)), is contradicted by *Boumediene's* application of the Great Writ to Guantanamo detainees. *Boumediene*, 128 S.Ct. at 2262 ("We hold that Art. I, § 9, Cl. 2, of the Constitution has full effect at Guantanamo Bay.) As with any of the other unincorporated territories, the scope of the Constitution's application is a function of practicality and given that GTMO is both closer to CONUS and less politically fraught, the government must meet a high burden in demonstrating why GTMO is any less subject to the Constitution than Puerto Rico. *Id*. at 2258. While the defense concedes that there is room for debate at the margins, *Boumediene* presumes the

[1] *See Verdugo*, 494 U.S. at 274-75. ("At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application. For better or for worse, we live in a world of nation-states in which our Government must be able to 'functio[n] effectively in the company of sovereign nations.' *Perez v. Brownell*, 356 U.S. 44, 57 (1958). Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country.").

application of due process, as does a long series of Supreme Court precedent beginning with the Insular Cases.[2] In articulating its central holding on whether CSRT proceedings substituted for habeas corpus, *Boumediene* reasoned that, "Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry." *Boumediene*, 128 S.Ct. at 2270. Any argument, therefore, that the United States can conduct a criminal trial that does not comply with the due process standards of the Constitution is baseless and an embarrassment. The political branches have no power "to switch the Constitution on or off at will." *Id.* at 2259.

c. Due process and the MCA require that the specification put the accused on notice of the elements of the offense charged.

(1) As is laid out in detail in the principal brief, due process requires that the specification "allege conduct clearly defined and easily recognizable in the military context as criminal." *United States v. Peszynski*, 40 M.J. 874 (N.M.C.M.R. 1994). In light of *Boumediene*, this basic due process standard is at least incorporated through MCA § 948q(b) and R.M.C. 307(c)(3), which requires the specification to allege "every element of the charged offense expressly or by necessary implication."

(2) Trial counsel take the position that the mere recitation of "the language 'in violation of the law of war' and 'unlawfully' provide notice of the criminality of the accused's charged misconduct." (Govt. Br. at para. 6(b)(5).) Mere recitation of the statutory elements, without their being supported by alleged conduct that satisfies them on the face of the specification, is not sufficient to provide the defendant notice of what charges he must defend against. "It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, – it must descend to particulars." *United States v. Cruikshank*, 92 U.S. 542, 558 (1875).

(3) There is no dispute that, unlike the elements of Murder by an Unprivileged Belligerent provided in Military Commission Instruction No. 2 (MCI2), the crime of Murder in Violation of the Law of War, as enacted by the MCA, includes the additional element of a violation of the law of war.

(i) The specification of Charge I, however, merely states that Mr. Khadr "violated the law of war, by throwing a hand grenade at U.S. Forces, resulting in the death of Sergeant First Class Speer." (Charge Sheet at 1.) Grenades are not prohibited weapons under the extant laws of war and Special Forces soldiers are not prohibited targets. "[T]he act charged does not of itself constitute criminal conduct." Gov't Resp at 6(b)(iv) (quoting *United States v. Brice*, 38 C.M.R. 134, 137 (C.M.A. 1967)).

[2] *See, e.g., Balzac v. Porto Rico*, 258 U. S. 298, 313 (1922) ("The guaranties of certain fundamental personal rights declared in the Constitution, *as, for instance, that no person could be deprived of life, liberty, or property without due process of law*, had from the beginning full application" in the unincorporated territories.) (emphasis added).

(ii) To make matters worse, despite two opportunities to clarify the specification, trial counsel refuses to articulate what specific law of war violation it is alleging. Instead, it alleges either "unprivileged belligerency," meaning the "violation of the law of war" element is mere surplusage so long as it can prove "unlawfulness," or in the alternative that Mr. Khadr committed perfidy. These efforts "to fill in the gaps of proof by surmise or conjecture" do not afford fair notice. *Russell v. United States*, 369 U.S. 749, 766 (1962). Specificity is necessary "to enable the court to decide whether the facts alleged are sufficient in law to withstand a motion to dismiss the indictment or to support a conviction in the event that one should be had." *Id*. at n.15.

(iii) The government cannot make vague allegations in the specification and proceed on an "in the alternative" basis. If it desires to have alternative theories of liability, it must specify those expressly and individually in the Charge Sheet, and not exploit the customary nature of one of the elements as an opportunity to experiment as the evidence is presented at trial. *See, e.g., Sanabria v. United States*, 437 U.S. 54, 66 (1978); *The Confiscation Cases*, 87 U.S. 92, 104 (1873).

d. Charge I fails to specify a necessary element of the offense.

(1) With respect to the adequacy of the specification of Charge I itself, trial counsel copies nearly verbatim its brief in response to D-008. Again trial counsel reiterates, what the instant motion does not contest, that "Congress was acting within its constitutional authority when it included 'in violation of the law of war' as a statutory element to Murder in violation of the law of war in the MCA." (Govt. Br. at para. 6(c).) What trial does not clarify is what in the specification of Charge I satisfies the war crime element.

(2) <u>"Unprivileged Belligerency" does not satisfy the war crime element of Murder in Violation of the Law of War.</u>

(i) While the general thrust of trial counsel's brief appears to argue that the war crime element is redundant of the "unlawfulness" element,[3] its need to fall back on unsubstantiated allegations of perfidy belies the fact that there is no clear Congressional designation of "unprivileged belligerency" as a war crime – not in the War Crimes Act, 18 U.S.C. 2441, or in the MCA. As stated in the defense's motion, the government did not even define "Murder by an Unprivileged Belligerent" as a violation of the law of war in MCI2, but rather put it in a catchall class of offenses that included perjury and obstruction of justice. Trial counsel variously accuses Mr. Khadr of simple "murder" and "homicide," (Govt. Br. at paras. 6(d)(ii), 6(d)(v)), but that is not a crime over which this military commission has jurisdiction. And trial counsel can still point to no prosecution of "unprivileged belligerency" in the post-Geneva Convention world.

(ii) Trial counsel correctly cites the decision of the CMCR for the proposition that "unlawful combatants may be 'treated as criminals under the domestic law of the

[3] (*See* Govt. Br. at para. 6(b)(v) ("That he did not enjoy the combatant's privilege is sufficient notice that the killing was 'in violation of the law of war.").)

capturing nation.'" (Govt. Br. at para. 6(d)(12) (quoting *United States v. Khadr*, CMCR 07-001, 6 (2007)).)

(A) Congress could have, but did not, give the military commission plenary jurisdiction over Title 18. Had it done so, trial counsel could have charged Mr. Khadr with a violation of 18 U.S.C. 1114, alleging nothing other than the "'unlawful' murder of SFC Chrisopher Speer as an 'alien unlawful enemy combatant' who does not benefit from 'combatant immunity.'" (Govt. Br. at para. 6(b)(5).)

(B) Instead, Congress gave these commissions limited subject matter jurisdiction over enumerated crimes widely recognized as governing the modern conduct of hostilities. As with Aiding the Enemy and Conspiracy,[4] Congress did not enact MCI2 verbatim into law, but revised the constituent elements of a number of the offenses to ensure that they would "not establish new crimes that did not exist before its enactment." MCA 950p(a). These legislative choices are made most apparent by the fact that Congress did not enact "Murder by an Unprivileged Belligerent," or any close variation such as "Murder of U.S. Personnel." It gave this military commission jurisdiction over Murder in Violation of the Law of War, which for the purposes of the MCA entails that a killing be *both* "unlawful" and done in "violation of the law of war." *See* R.M.C., Part IV, at para. 6(15).

(C) Trial counsel consistently attempts to conflate these two elements and on at least three occasions, repeats words to the effect of "there can be little doubt that killing by an unlawful combatant is in fact a violation of the law of war." (Govt. Br. at 6(d)(i).)[5] Not once, however, is this mantra followed by any authority. "[T]he fact that the government has 'said it thrice' does not make an allegation true." *Parhat v. Gates*, 2008 WL 2576977 at *13 (D.C. Cir. 2008). Nor does a "142-year-old opinion, which remains binding on the Executive branch," control the findings of law made by the military judge. (Govt. Br. at para. 6(d)(vi)). Unlike the previous military commission system, the military judge is not sitting as a presiding officer, but as a judge, with an independent duty to apply congressional law.

(iii) Trial counsel concedes that "Congress did not criminalize 'unprivileged belligerency' per se, but it certainly had the constitutional authority to define killing by an unlawful combatant as a violation of the law of war." (Govt. Br. at para. 6(c)(iii).)

(A) The defense is willing to concede that Congress' authority to "define and punish offenses against the law of nations" could prospectively extend to defining

[4] MCI2 defined the elements of Conspiracy to include the joining of a criminal "enterprise," a theory of liability that was not adopted by Congress in enacting the MCA. MCA 950v(28). The previous military judge in this case struck the criminal enterprise language from Charge III on the grounds that the MCA did not legislate Conspiracy as it had been defined in MCI2. Ruling on Defense Motion to Strike Surplus Language from Charge III, D-019, dated 4 April 2008.

[5] *See also* Govt. Br. at 6(d)(xii) ("Unlawful or unprivileged combatants – such as Khadr – violate the laws of war when they commit war-like acts, such as murder."); *see also id*, at 6(d)(xix) ("These sources establish an irrefutable consensus, as a matter of United States and international law, that murder committed by an individual – like Khadr – who takes up arms without satisfying the conditions for lawful combat is a violation of the law of war.").

"unprivileged belligerency" as a war crime. The problem is that Congress has not yet defined such a crime either in the MCA or elsewhere. In fact, the MCA did not define "violation of the law of war" at all, let alone as trial counsel wishes it had.

(B) Congress instead incorporated by reference a recognizable collection of norms that govern modern, urban warfare. These norms are not only contained in treaties and treatises, but in Title 18. The War Crimes Act (WCA), passed in 1996, enacts violations of the law of war into federal law by reference to the Hague and Geneva Conventions and by express enumeration. *See* 18 U.S.C. § 2441. Among those expressly enumerated is "Murder" in violation of the law of war. The WCA defines "Murder" as "The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause." 18 U.S.C. § 2441(d)(1)(D). Nowhere does the WCA make any mention of "unprivileged belligerency," and there was no treaty or statute in the decade between the enactment of the WCA and MCA that would otherwise expand the scope of which murders are war crimes.

(C) Most telling of this fact, the only definition of Murder in Violation of the Law of War thus far used in the military commissions is substantively identical to how it is defined in the War Crimes Act:

> Definitions:
> A killing violates the law of war where a combatant *(whether lawful or unlawful)* intentionally and without justification kills:
> (i) civilians not taking an active part in hostilities;
> (ii) military personnel placed *hors de combat* by sickness, wounds, or detention; or
> (iii) military medical or religious personnel.

United States v. Hamdan, Prefatory Instructions on Findings, dated 4 August 2008, at 4. (emphasis added).[6]

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[6] *See also* instruction on Conspiracy to Destroy Property in Violation of the Law of War:

> In order to find Mr. Hamdan guilty of Conspiracy to Destroy Property in Violation of the Law of War, you must find beyond a reasonable doubt that Mr. Hamdan:
> (1) entered into an agreement;
> (2) to intentionally and without consent destroy property of another which is not a military objective;
> (3) that Mr. Hamdan knew the unlawful purpose of the agreement and joined willingly, with the intent to further the unlawful purpose;
> (4) that Mr. Hamdan committed an overt act in furtherance of the agreement; and
> (5) that the agreement and the intended destruction of property took place in the context of and was associated with an armed conflict.
>
> Definitions:
> Military objectives are combatants, and those objects during an armed conflict:

(3) Nothing in the specification of Charge I alleges the elements of perfidy.

(i) Trial counsel attempts to salvage Charge I by alleging that Mr. Khadr murdered SSG Speer through means of perfidy. "Even for otherwise lawful combatants (which Khadr is not), one example of murder in violation of the law of war is the 'treacherous[]' killing of 'individuals belonging to the hostile nation or army.'" (Govt. Br. at para. 6(d)(xiii).) As stated in the defense motion, the defense does not contest that if the specification alleged perfidious killing, then that would articulate both a killing that was unlawful (if perpetrated by someone without combatant privilege) and in violation of the law of war (if perfidious).

(ii) Contrary to trial counsels' assertions, however, there is no indication in the specification or even in trial counsel's statement of "facts" that Mr. Khadr "feign[ed] to be a non-combatant." (Govt. Br. at para. 6(d)(xi).) Rather, the supporting evidence for both describes a conventional battle that could be taken out of a textbook on U.S. war fighting doctrine. In a "pre-planned operation," fifty-five personnel took up positions at the "location and established a cordon." (Memorandum for Commander, 28 Jul 02, at paras. 2(A)-(B) (Attachment B to D028).) Once the engagement began, U.S. forces initiated a significant bombardment of the compound by combat air support. (*Id*.) Wholly aware of the enemy fighters inside, the on-scene commander ordered the penetration of the compound by "an assault element to clear the target." (*Id*. at para. 2(C).) While entering and once inside, U.S. Forces threw hand grenades throughout the compound to ensure the target was cleared. (*See, e.g.*, RIA, 7 Dec 05 Summary of Soldier #3 Interview (Attachment A to D-071); RIA, 7 Dec 05 Summary of Soldier #4 Interview (Attachment B to D-071); RIA, 7 Dec 05 Summary of Soldier #5 Interview (Attachment C to D-071)); *cf*. FM 3-06.11, Combined Arms Operations in Urban Areas, 28 February 2002, at para. 3-22(c).

(iii) Never has it been alleged that Mr. Khadr "invited the confidence or belief of one or more persons that they were entitled, or obliged to accord, protection under the law of war." R.M.C., Part IV, at para. 17(b)(1). From the moment fifty-five personnel established a cordon around the compound pursuant to their "pre-planned operation," Mr. Khadr was understood to be an obvious and lawful target of attack. Nothing in the specification or trial counsel's motion indicated that Mr. Khadr feigned protected status in order to ambush SSG Speer. Trial counsel's effort to allege perfidy via its motions practice is therefore both untimely and without support in the specification. *United States v. Fabrizio*, 385 U.S. 263, 275 (1965) (The court "cannot remedy the deficiencies in the indictment by retroactively reading the Government's new charges into it.").

e. Conclusion

(1) The clearest evidence that Charge I is facially deficient is trial counsels' inability to identify and support a coherent legal theory under which Charge I specifies the war

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(i) which by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability, and

(ii) the total or partial destruction, capture or neutralization of which would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

Civilian objects are all objects that do not qualify as military objectives.

crime element of Murder in Violation of the Law of War. Instead, trial counsel offers a scatter shot approach, alleging in its briefing that Charge I specifies either "unprivileged belligerency" or perfidy.

(2) The former theory fails because "unprivileged belligerency" has not been a recognized war crime since at least the ratification of the Geneva Conventions, and given the age of the authority upon which trial counsel relies in this case, possibly since the Civil War.[7] If the latter, the specification fails because it makes no allegation that Mr. Khadr was anything other than an obvious and lawful target of attack. Under either theory, the specification is facially insufficient and deprives Mr. Khadr of any notice of what war crime he is alleged to have committed and what trial counsel's burden will be at trial.

(3) Trial counsel's insistence that it is under no obligation to specify the war crime element of Charge I with particularity is to insist that Congress sought to accomplish nothing by enumerating a limited class of offenses in the MCA. Trial counsel's apparent objective is to take the more serious overt acts alleged in support of Charges III and IV and transform them via artful pleading into the more sensational, but unsupportable, Charge I. The military judge is not sitting as a presiding officer and the crimes over which this commission has jurisdiction are not found in the Executive order MCI2 but in the Congressional enactment of the MCA. Congress intended Murder in Violation of the Law of War to convict terrorists for war crimes, not to convict every unlawful enemy combatant as a murderer. Charge I fails to state this central element of the offense with the necessary specificity and therefore should be dismissed.

[7] Insofar as trial counsel would like to rest this commissions' decision on the Supreme Court sittings of the 1790s, Mr. Khadr would point to the opinion of Justice Patterson in the case of *Ware v. Hylton*, 3 U.S. 199 (1796). In rejecting the continued legal validity of debt confiscation under the customary laws of war, he wrote in relevant part that it "is considered a disreputable thing among civilized nations of the present day, and indeed nothing is more strongly evincive of this truth than that it has gone into general desuetude." *Id*. at 255. Whatever customary law may have prevailed during the Civil War, the failure to prosecute *anyone* in the intervening 150 years shows that the war crime of "unprivileged belligerency," to the extent it ever existed, is desuetude. *See also Poe v. Ullman*, 367 U.S. 497, 502 (1961) ("The undeviating policy of nullification [of the laws] throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. What was said in another context is relevant here. 'Deeply embedded traditional ways of carrying out state policy . . .' -- or not carrying it out – 'are often tougher and truer law than the dead words of the written text.'") (quoting *Nashville v. Browning*, 310 U.S. 362 (1940)).

3. Evidence:

Memorandum for Commander, 28 Jul 02, Attachment B to D028

RIA, 7 Dec 05 Summary of Soldier #3 Interview, Attachment A to D-071

RIA, 7 Dec 05 Summary of Soldier #4 Interview, Attachment B to D-071

RIA, 7 Dec 05 Summary of Soldier #5 Interview, Attachment C to D-071

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Assistant Detailed Defense Counsel

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

D-071

Defense Supplement to Government Response to Motion to Dismiss Charge I For Failure to State an Element of the Offense in Violation of Due Process

15 August 2008

1. Timeliness: This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the Military Judge's 19 June 2008 scheduling order.

2. Argument

a. Defense would like to direct the military commission's attention to supplemental evidence relevant to the disposition of D-071. These include two documents – the draft of the MCA submitted to Congress by the White House in the Summer of 2006, entitled "Enemy Combatant Military Commissions Act of 2006" (Attachment A) ("Draft MCA") and the transcript of the 2 August 2006 hearing of the Senate Armed Services Committee entitled "The Future of the Military Commissions" (Attachment B) ("MCA Hearing"), where the Draft MCA was considered by the Senate.

b. Draft MCA § 247 enumerates the substantive offenses over which the military commissions will have jurisdiction in largely identical terms as Military Commission Instruction No. 2 ("MCI2"). The Draft MCA divided the triable offenses into two classes. The first class comprised "Offenses in Violation of the Laws of War." Draft MCA § 247(b). The second class comprised "Other Offenses Triable by Military Commission." Draft MCA § 247(c). Like MCI2, Draft MCA § 247(c)(3) criminalized the offense of "Murder by an Unprivileged Belligerent," and also like MCI2, this offense was not listed among the "Offenses in Violation of the Laws of War," but in the catchall category of "Other Offenses Triable by Military Commission."

c. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987). Congress was not only aware of "Unprivileged Belligerency" from the old military commission system, but expressly rejected a draft of the MCA that included it. The enumeration of nineteen "Violations of the Laws of War" in the Draft MCA makes abundantly clear what acts Congress intended to cover with the "in violation of the law of war" element of "Murder in Violation of the Law of War," and "Unprivileged Belligerency" is not one of them. The Charge Sheet, on its face, fails to specify conduct that satisfies a necessary element of the offense and should therefore be dismissed.

3. Evidence:

A. Draft of the MCA submitted to Congress by the White House in the Summer of 2006, entitled "Enemy Combatant Military Commissions Act of 2006"

B. Transcript of the 2 August 2006 hearing of the Senate Armed Services Committee entitled "The Future of the Military Commissions"

/s/
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Detailed Defense Counsel

Rebecca S. Snyder
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FOR DISCUSSION PURPOSES ONLY
DELIBERATIVE DRAFT—
CLOSE HOLD

A BILL

To facilitate bringing ~~terrorists~~ enemy combatants to justice through full and fair trial by military commissions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

CHAPTER 1—

SECTION 101. SHORT TITLE.

This Act may be cited as the "Enemy Combatant Military Commissions Act of 2006."

SECTION 102. FINDINGS.

The Congress finds:

(1) For more than 10 years, the al Qaeda terrorist organization has waged an unlawful war of violence and terror against the United States and its allies. Al Qaeda was involved in the bombing of the World Trade Center in New York City in 1993, the bombing of the U.S. Embassies in Kenya and Tanzania in 1998, and the attack on the U.S.S. *Cole* in Yemen in 2000. On September 11, 2001, al Qaeda launched the most deadly foreign attack on U.S. soil in history. Nineteen al Qaeda operatives hijacked four commercial aircraft and piloted them into the World Trade Center Towers in New York City and the headquarters of the U.S. Department of Defense at the Pentagon, and downed United Airlines Flight 93. The attack destroyed the Towers, severely damaged the Pentagon, and resulted in the deaths of approximately 3,000 innocent people.

(2) Following the attacks on the United States on September 11, Congress recognized the existing hostilities with al Qaeda and affiliated terrorist organizations and by the Authorization for the Use of Military Force Joint Resolution (Public Law 107-40) recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States" and authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

(3) The President's authority to convene military tribunals arises from the Constitution's vesting in the President of the executive power and the power of Commander in Chief of the Armed Forces. As the Supreme Court of the United States recognized in *Madsen v. Kinsella*, 343 U.S. 341 (1952), "[s]ince our nation's earliest days, such tribunals have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. . . . They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth."

(4) Exercising authority vested in the President by the Constitution and laws of the United States, including the Authorization for Use of Military Force Joint Resolution, and ~~consistent~~ in accordance with the laws of war, the President has (A) detained enemy combatants in the course of this armed conflict; and (B) issued the Military Order of November 13, 2001 to govern the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," which authorized the Secretary of Defense to establish military commissions to try individuals subject to that Order by military commission for any offenses triable by military commission that such individuals are alleged to have committed.

(5) The Supreme Court in *Hamdan v. Rumsfeld* (2006) held that the military commissions established by the Department of Defense under the President's Military Order of November 13, 2001 were not consistent with certain aspects of U.S. domestic law. The Congress may by law, and does by enactment of this statute, eliminate any deficiency of statutory authority to facilitate bringing ~~alien~~ enemy combatants with whom the United States is engaged in armed conflict to justice for violations of the laws of war and other crimes triable by military commissions. The prosecution of such ~~alien~~ enemy combatants by military commissions established and conducted consistent with this Act fully complies with the Constitution, the laws of the United States, treaties to which the United States is a party, and the laws of war.

(6) The use of military commissions is particularly important because ~~the conflict between the United States and international terrorist organizations, including al Qaeda, the Taliban, and associated forces generally makes~~ other alternatives, such as the use of Federal courts or courts-martial, are impracticable. The terrorists with whom the United States is engaged in armed conflict have demonstrated a commitment to the destruction of the United States and its people, to violation of the laws of war, and to the abuse of American legal processes. In a time of ongoing armed conflict, it is neither practicable nor appropriate for ~~alien~~

enemy combatants like al Qaeda terrorists to be tried like American citizens in Federal courts or courts-martial.

(7) Many procedures for courts martial would not be practicable in trying alien enemy combatants for whom this Act provides for trial by military commission. For instance, court-martial proceedings would in certain circumstances—

(A) require the Government to share classified information with the accused, even though members of al Qaeda cannot be trusted with our Nation's secrets and it would not be consistent with the national security of the United States to provide them with access to classified information;

(B) exclude the use of hearsay evidence determined to be probative and reliable, even though the hearsay statements from, for example, fellow terrorists are often the only evidence available in this conflict, given that terrorists rarely fight and declare their intentions openly but instead pursue terrorist objectives in secret conspiracies the objectives of which can often be discerned only or primarily through hearsay statements from collaborators; and

(C) specify speedy trials and technical rules for sworn and authenticated statements when, due to the exigencies of wartime, the United States cannot safely require members of the armed forces to gather evidence on the battlefield as though they were police officers nor can the United States divert members from the front lines and their duty stations to attend military commission proceedings.

(8) The exclusive judicial review for which this Act, and the Detainee Treatment Act of 2005, provides, is without precedent in the history of armed conflicts involving the United States, exceeds the scope of judicial review historically provided for by military commissions, and is channeled in a manner appropriately tailored to—

(A) the circumstances of the conflicts between the United States and international terrorist organizations; and

(B) and the needs to ensure fair treatment of those detained as enemy combatants, to minimize the diversion of members of the armed force for from other wartime duties, and to protect the national security of the United States.

(9) In early 2002, as memorialized in a memorandum dated February 7, 2002, the President determined that common Article 3 of the Geneva Conventions did not apply with respect to the United States conflict with al Qaeda because al Qaeda was not a party to those treaties and the conflict with al Qaeda was an armed conflict of an international character. That was the interpretation of the United States prior to the Supreme Court's decision in *Hamdan* on June 29, 2006. The statement by the Supreme Court in *Hamdan* that common Article 3 applied gave rise to uncertainties in the conduct of the conflict, and this Act addresses such uncertainties. In particular, this Act makes clear that the standards for treating detainees under the Detainee Treatment Act of 2005 fully satisfy any obligations of the United States regarding detainee treatment under common Article 3(1), except for those obligations arising under paragraphs (b) and (d). In addition, the Act makes clear that the Geneva Conventions are not a source of judicially enforceable individual rights, thereby reaffirming that enforcement of the legal and political obligations imposed by the Conventions is a matter between the nations that are parties to them.

SEC. ~~102~~103. DEFINITIONS.

As used in this Act:

~~(1) "alien enemy combatant" means an enemy combatant who is not a citizen of the United States;~~

~~(2)~~(1) "classified information" means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954;

~~(3)~~(2) "commission" means a military commission established pursuant to chapter 2 of this Act;

~~(4)~~(3) "enemy combatant," for the purposes of this statute, means a person engaged in hostilities against the United States or its coalition partners who has committed an act that violates the law of war and this statute. The term enemy combatant includes "lawful combatants" and "unlawful combatants." ~~a individual (other than an individual found by the President or the Secretary of Defense to be entitled to status as a prisoner of war or as a "protected person" under Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949) determined by or under the authority of the President or the Secretary of Defense, to~~—

(A) "Lawful" enemy combatant include members of the regular armed forces of a State party to the conflict; militia, volunteer corps, and organized resistance movements belonging to a State party to the conflict, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war; and, members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power ~~be part of or supporting an international terrorist organization engaged in hostilities against the United States or its co-belligerents, including but not limited to al Qaeda, the Taliban, or associated forces;~~

(B) "Unlawful" enemy combatants are persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict. Spies and saboteurs are traditional examples of unlawful enemy combatants. For purposes of the war on terrorism, the term Unlawful Enemy Combatant is defined to include, but is not limited to, an individual who is or was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners ~~to have committed a belligerent act in aid of such an organization so engaged; or~~

~~(C) to have directly supported hostilities in aid of such enemy armed forces.~~

(4) "Geneva Conventions" means the four international conventions signed at Geneva, 12 August 1949, including common Article 3;

(5) "Law of war" is that part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law applicable to the conduct of hostilities that is binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party (e.g., the Geneva Conventions of 1949), and applicable customary international law as recognized by the United States.

(6) "person" includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

SEC. ~~103~~104. AUTHORIZATION FOR MILITARY COMMISSIONS.

(a) The President is authorized to establish military commissions for the trial of alien enemy combatants for violations of the laws and customs of war and other crimes triable by military commissions as provided in chapter 2 of this Act. The grant of this authority should not be understood to limit the President's constitutional authority to establish military commissions on the battlefield, in occupied territories, or in armed conflicts should circumstances so require.

~~(b)~~ Military commissions shall have the authority, under such limitations as the President or Secretary of Defense may prescribe, to adjudge any punishment not forbidden by this act, including the penalty of death, imprisonment for life or term of years, payment of fine or restitution, or any other lawful punishment, ~~impose upon any accused found guilty after a proceeding under this Act a sentence that is appropriate to the offense or offenses for which there was a finding of guilt, which sentence may include death, imprisonment for life or term of years, payment of fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper.~~

(b)

(c) The Secretary of Defense or his designee shall be authorized to carry out a sentence of punishment decreed by a military commission pursuant to such procedures.

(d) The Secretary of Defense shall submit to the Armed Services Committees of the House of Representatives and the Senate an annual report on the conduct of trials by military commissions under this Act. Each such report shall be submitted in unclassified form, with classified annex, if necessary, and consistent with national security. The report shall be submitted not later than December 31 of each year.

(e) Pursuant to the President's authority under the Constitution and laws of the United States, including the Authorization for Use of Military Force Joint Resolution, and in accordance with the law of war, the United States has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities. The authority to detain enemy combatants until the cessation of hostilities is wholly independent of any pre-trial detention or sentence to confinement that may occur as a result of a military commission. An enemy combatant may always be detained, regardless of the pendency or outcome of a military commission, until the cessation of hostilities as a means to prevent their return to the fight.

CHAPTER 2—MILITARY COMMISSIONS

This chapter may be cited as the "Code of Military Commissions" and shall be codified as Chapter 47A of Title 10, United States Code.

SEC. 201. MILITARY COMMISSIONS GENERALLY.

~~(a)~~ PURPOSE.—This chapter codifies and establishes procedures governing the use of military commissions to try alien enemy combatants for violations of the laws of war and any other crimes triable by military commissions[n]. ~~Although military commissions have traditionally been constituted by order of the President, the decision of the Supreme Court in *Hamdan v. Rumsfeld* makes it both necessary and appropriate to codify procedures for military commissions as set forth herein.~~

(a)

(b) RULE OF CONSTRUCTION.—The procedures for military commissions set forth in this chapter are modeled after the procedures established for courts martial in the Uniform Code of Military Justice. As provided in Chapter 1, Section 102 (7), it is not practicable to try unlawful enemy combatants pursuant to the UCMJ or the procedures contained in the Manual for Courts-martial. However, due to the similarities of the UCMJ and CMC, the precedents established under the UCMJ may form precedential value for military judges and appellate courts when interpreting the rules under the CMC, but only insomuch as the provisions of each act are the same. It is not intended that any of the rights, privileges, or procedures contained under the UCMJ, and specifically removed from the CMC, are to be applied by implication or application. ~~It would be neither desirable nor practicable to try alien enemy combatants by court martial procedures, however. Therefore, no construction or application of chapter 47 of this title shall be controlling in the construction or application of this chapter.~~[o]

(c) Members of al Qaeda and affiliated organizations may be tried for ~~war crimes~~violations of the law of war and offenses triable by military commissions committed against the United States or its co-belligerents before, on, or after September 11, 2001. A person charged with an offense under this Act may be tried and punished at any time without limitations. An acquittal or conviction under this act does not preclude the United States, in accordance with the law of war, to detain enemy combatants until the cessation of hostilities as a means to prevent their return to the fight.

(d) A military commission established under this chapter is a regularly constituted court, affording all the necessary judicial guarantees for purposes of common Article 3 of the Geneva Conventions.

SEC. 202. PERSONS SUBJECT TO MILITARY COMMISSIONS.

~~Alien e~~Enemy combatants, as defined in section 102 of this Act, shall be subject to trial by military commissions as set forth in this chapter.

(adapted from UCMJ Art. 2)

SEC. 203. JURISDICTION OF MILITARY COMMISSIONS.

Military commissions shall have jurisdiction to try any offense made punishable by this chapter, or by regulations promulgated pursuant to this chapter, when committed by an alien enemy combatant.

(adapted from UCMJ Art. 17, 18)

SEC. 204. WHO MAY CONVENE MILITARY COMMISSIONS.

(a) The Secretary of Defense may issue orders appointing one or more military commissions to try individuals under this chapter.

(b) The Secretary of Defense may delegate his authority to convene military commissions or to promulgate any regulations under this chapter.

(c) The "Secretary" in this chapter shall be the "Secretary of Defense." The "convening authority" shall be the Secretary of Defense or his designee.

(adapted from UCMJ Art. 22)

SEC. 205. WHO MAY SERVE ON MILITARY COMMISSIONS. [26]

(a) Any commissioned officer of the United States Armed Forces on active duty is eligible to serve on a military commission. Eligible commissioned officers shall include, without limitation, reserve personnel on active duty, National Guard personnel on active duty in Federal service, or retired personnel recalled to active duty.

(b) When convening a commission, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a commission when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(c) Before a commission is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case.

(adapted from UCMJ Art. 25)

SEC. 206. MILITARY JUDGE OF A MILITARY COMMISSION.

(a) A military judge shall be detailed to each commission. The Secretary shall prescribe regulations providing for the manner in which military judges are detailed for such commissions and for the persons who are authorized to detail military judges for such ~~courts-martial~~commissions. The military judge shall preside over each commission to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a commission shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member in accordance with regulations prescribed under subsection (a). Unless the military commission is convened by the Secretary of Defense, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. ~~A commissioned officer who is certified to be qualified for duty as a military judge of a commission may perform such duties as are assigned to him by or with the approval of that Judge Advocate General or his designee.~~

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a commission may not consult with the members of the commission except in the presence of the accused (except as provided in section 216), trial counsel, and defense counsel, nor may he vote with the members of the commission.

(adapted from UCMJ Art. 26)

SEC. 207. DETAIL OF TRIAL COUNSEL AND DEFENSE COUNSEL

(a) Trial counsel and defense counsel shall be detailed for each commission. Assistant trial counsel and assistant and associate defense counsel may be detailed for each commission. Defense counsel shall be detailed as soon as practicable after the swearing of charges against the person accused. The Secretary of Defense shall prescribe regulations providing for the manner in which counsel are detailed for such commission and for the persons who are authorized to detail counsel for such commission.

(b) No person who has acted as investigating officer, military judge, or court commission member in any case may act later as trial counsel or, unless expressly requested by the accused, as defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later in the same case for the prosecution.

(c) Trial counsel or defense counsel detailed for a military commission—

(1) must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and

(2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member; or

(3) must be otherwise qualified to practice before the commission pursuant to regulations prescribed by the Secretary of Defense.

(adapted from UCMJ Art. 27)

SEC. 208. DETAIL OR EMPLOYMENT OF REPORTERS AND INTERPRETERS.

Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission shall detail or employ qualified court reporters, who shall record the proceedings of and testimony taken before that commission. Under like regulations the convening authority may detail or employ interpreters who shall interpret for the commission, to include interpretation for the defense.

(adapted from UCMJ Art. 28)

SEC. 209. ABSENT AND ADDITIONAL MEMBERS.

(a) No member of a military commission may be absent or excused after the ~~court~~ commission has been assembled for the trial of the accused unless excused as a result of challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.

(b) A military commission shall have at least five members. Whenever a military commission is reduced below that number, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than five members. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the ~~court~~ commission has been read to the ~~court~~ commission in the presence of the military judge, the accused (except as provided by section 216), and counsel for both sides.

(adapted from UCMJ Art. 29)

SEC. 210. CHARGES AND SPECIFICATIONS.

(a) Charges and specifications shall be signed by a person subject to the Uniform Code of Military Justice under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or reason to believe, the matters set forth therein; and

(2) that they are true in fact to the best of his/her knowledge and belief.

(b) Upon the swearing of the charges in accordance with subsection (a), the person accused shall be informed of the charges against him as soon as practicable.

(adapted from UCMJ Art. 30)

SEC. 211. COMPULSORY SELF-INCRIMINATION PROHIBITED.

(a) No person shall be required to testify against himself at a commission proceeding.

(b) Statements obtained by use of torture, as defined in 18 U.S.C. § 2340, whether or not under color of law, shall not be admissible, except against a person accused of torture as evidence the statement was made. No otherwise admissible statement obtained through the use of [redacted] may be received in evidence if the military judge finds that the circumstances under which the statement was made render it unreliable or lacking in probative value.

(adapted from UCMJ Art. 31)

SEC. 212. SERVICE OF CHARGES.

The trial counsel to whom charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had in English and, if appropriate, in another language that the accused understands, sufficiently in advance of trial to prepare a defense.

(adapted from UCMJ Art. 35)

SEC. 213. RULES OF PROCEDURE.

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases triable in military commissions may be prescribed by the Secretary of Defense, but may not be contrary to or inconsistent with this chapter.

(b) Subject to such exceptions and limitations as the Secretary of Defense may provide by regulation, evidence in a military commission shall be admissible if the military judge determines that the evidence ~~would have probative value to a~~

~~reasonable person~~ is relevant and has probative value. Hearsay evidence shall be admissible in the discretion of the military judge unless the circumstances render it unreliable or lacking in probative value.

(c) SUBMISSION OF PROCEDURES.—Not later than 90 days after the date of enactment of this Act, the Secretary of Defense shall submit to the Armed Services Committees of the House of Representatives and the Senate a report setting forth the procedures for military commissions promulgated under this chapter. Thereafter, the Secretary of Defense shall submit to the same committees a report on any modification of such procedures, no later than 60 days before the date on which such modifications shall go into effect.

(adapted from UCMJ Art. 36)

SEC. 214. UNLAWFULLY INFLUENCING ACTION OF COMMISSION.

(a) No authority convening a military commission may censure, reprimand, or admonish the commission or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the commission, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person may attempt to coerce or, by any unauthorized means, influence the action of a commission or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to

(1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions, or

(2) to statements and instructions given in open proceedings by the military judge or counsel.

~~(b)~~In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person may, in preparing any such report consider or evaluate the performance of duty of any such member of a commission, or give a less favorable rating or evaluation of any member or the armed forces because of the zeal with which such member, as counsel, represented any accused before a military commission. ~~as counsel in representing any accused before a military commission.~~

(b)

(adapted from UCMJ Art. 37)

SEC. 215. DUTIES OF TRIAL COUNSEL AND DEFENSE COUNSEL.

(a) TRIAL COUNSEL.—The trial counsel of a military commission shall prosecute in the name of the United States, and shall, under the direction of the ~~court~~commission, prepare the record of the proceedings.

(b) DEFENSE COUNSEL.—

(1) The accused shall be represented in his defense before a military commission as provided in this subsection[10].

(2) The accused may be represented by civilian counsel if ~~provided~~ retained by him, provided that civilian counsel: (i) is a United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction of disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher; (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings; and (vi) complies with any other requirements that the Secretary of Defense may prescribe by regulation[11].

(3) The accused shall also be represented by military counsel detailed under section 207 of this chapter.

(4) If the accused is represented by civilian counsel, military counsel detailed shall act as associate counsel.

(5) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 207 of this chapter to detail counsel in his sole discretion may detail additional military counsel.

(adapted from UCMJ Art. 38)

SEC. 216. SESSIONS.

(a) At any time after the service of charges which have been referred for trial by military commission, the military judge may call the commission into session without the presence of the members for the purpose of—

(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the commission;

(3) if permitted by regulations of the Secretary of Defense, holding the arraignment and receiving the pleas of the accused; and

(4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 213 of this chapter and which does not require the presence of the members of the commission.

These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel, except as provided by subsection (c), and shall be made part of the record.

(b) When the members of the commission deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the commission with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, and the trial counsel, except as provided by subsection (c).

(c) The military commission shall hold open proceedings, in the presence of the accused, except as provided in this subsection.

(1) The military judge may close all or part of a proceeding on his own initiative or based upon a presentation, including an *ex parte* or *in camera* presentation, by either the prosecution or the defense.

(2) The military judge may close to the public all or a portion of the proceeding upon a finding that closing of the proceeding is necessary to protect classified information; information the disclosure of which could reasonably be expected to cause identifiable damage to the public interest; the physical safety of the participants in the proceeding; intelligence and law enforcement sources, methods, or activities; or other national security interests.

(3) A decision to close a proceeding or portion thereof may include a decision to exclude the accused only upon a finding by the military judge that doing so is necessary to protect the national security, to ensure the safety of individuals, or to prevent disruption. One military defense counsel shall be present for all trial proceedings, and the exclusion of the accused shall be no broader than necessary.

(4) If the accused is denied access to classified evidence presented in the proceeding, a redacted or unclassified summary of evidence shall be provided, if it is possible to do so without compromising intelligence sources, methods, or activities, or other national security interests. No evidence shall be admitted to which the accused has been denied access if its admission would result in the denial of a [redacted].

(adapted from UCMJ Art. 39)

SEC. 217. CONTINUANCES.

The military judge may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

(adapted from UCMJ Art. 40)

SEC. 218. CHALLENGES.

(a) The military judge and members of the commission may be challenged by the accused or the trial counsel for cause stated to the commission. The military judge shall determine the relevance and validity of the challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those challenges presented by the defense ~~by the accused~~ are offered.

(b) Each accused and the trial counsel is entitled to one peremptory challenge, but the military judge may not be challenged except for cause.

(adapted from UCMJ Art. 41)

SEC. 219. OATHS.

(a) Before performing their respective duties, military judges, members of commissions, trial counsel, defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully. The form of the oath, the time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary. These regulations may provide that an oath to perform faithfully duties as a military judge, trial counsel, or defense counsel, may be taken at any time by any judge advocate or other person certified to be qualified or competent for duty, and if such an oath is taken it need not again be taken at the time the judge advocate, or other person is detailed to that duty.

(b) Each witness before a commission shall be examined on oath.

(adapted from UCMJ Art. 42)

SEC. 220. FORMER JEOPARDY.

(a) No person may, without his consent, be tried by a commission a second time for the same offense.

(b) No proceeding in which the accused has been found guilty by military commission upon any charge or specification is a trial in the sense of this section until the finding of guilty has become final after review of the case has been fully completed.

(adapted from UCMJ Art. 44)

SEC. 221. PLEAS OF THE ACCUSED[113].

(a) If an accused after charges have been filed makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the commission shall proceed as though he had pleaded not guilty.

(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty is sought. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge, a finding of guilty of the charge or specification may, if permitted by regulations, be entered immediately without a vote. This finding shall constitute the finding of the commission unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

(adapted from UCMJ Art. 45)

SEC. 222. OPPORTUNITY TO OBTAIN WITNESSES AND OTHER EVIDENCE.

(a) Defense counsel shall have opportunity to obtain witnesses and other evidence in accordance with such regulations as the Secretary of Defense may prescribe. Defense counsel may cross-examine each witness for the prosecution who testifies before the commission. Process issued in military commissions to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any place where the United States shall have jurisdiction thereof.

(b) As soon as practicable, trial counsel shall disclose to the defense the existence of any evidence known to trial counsel that reasonably tends to exculpate the accused. Exculpatory evidence that is classified may be provided solely to military defense counsel, after in camera review by the military judge. All exculpatory classified evidence shall be provided to the accused in a redacted or summary form, if it is possible to do so without compromising intelligence sources, methods, or activities, or other national security interests.

(adapted from UCMJ Art. 46)

SEC. 223. DEFENSE OF LACK OF MENTAL RESPONSIBILITY.

(a) It is an affirmative defense in a trial by military commission that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

(b) The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

(c) Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall instruct the members of the commission as to the defense of lack of mental responsibility under this section and shall charge them to find the accused—

(1) guilty;

(2) not guilty; or

(3) not guilty only by reason of lack of mental responsibility.

(adapted from UCMJ Art. 50A)

SEC. 224. VOTING AND RULINGS.

(a) Voting by members of a military commission on the findings and on the sentence shall be by secret written ballot.

(b) The military judge shall rule upon all questions of law, including the admissibility of evidence, and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused is final and constitutes the ruling of the commission. However, the military judge may change his ruling at any time during the trial.

(c) Before a vote is taken of the findings, the military judge shall, in the presence of the accused and counsel, instruct the members of the commission as to the elements of the offense and charge them—

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;

(3) that, if there is reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States.

(adapted from UCMJ Art. 51)

SEC. 225. NUMBER OF VOTES REQUIRED.

(a) CONVICTION[D14].—

~~No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the military commission present at the time the vote is taken.~~

~~(2)~~

(1) No person may be convicted of any ~~other~~ offense, except as provided in section 221(b) of this chapter or by concurrence of two-thirds of the members present at the time the vote is taken.

(2) Where less than two-thirds of the members present at the time the vote is taken do not concur, the accused is acquitted of the respective offense.

(b) SENTENCE.—

(1) Capital Cases. Where the President or Secretary have expressly made an offense punishable by death, ~~N~~no person may be sentenced to suffer death, unless all members present at the time the vote is taken ~~except~~

(A) unanimously concur in a finding of guilty; and

(B) unanimously concur in a sentence of death, ~~by the concurrence of all the members of the military commission present at the time the vote~~

~~is taken and for an offense in this chapter expressly made punishable by death.~~

(2) Non-Capital Cases.

(A) No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.[15]

(B) All other sentences shall be determined by the concurrence of two-thirds of the members at the time the vote is taken.

(adapted from UCMJ Art. 52)

SEC. 226. COMMISSION TO ANNOUNCE ACTION.

A military commission shall announce its findings and sentence to the parties as soon as determined.

(adapted from UCMJ Art. 53)

SEC. 227. RECORD OF TRIAL.

(a) Each military commission shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or by that of a member of the commission if the trial counsel is unable to authenticate it by reason of his death, disability, or absence. Where appropriate, and as provided by regulation, the record of the military commission may contain a classified annex.

(b) A complete record of the proceedings and testimony shall be prepared in every military commission established under this chapter.

(c) A copy of the record of the proceedings of each military commission shall be given to the accused as soon as it is authenticated. Where the record contains classified information, or a classified annex, the accused should receive a redacted version of the record. The appropriate defense counsel shall have access to the unredacted record, as provided by regulation.

(adapted from UCMJ Art. 54)

SEC. 228. CRUEL OR UNUSUAL PUNISHMENTS PROHIBITED.

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a military commission or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

(adapted from UCMJ Art. 55)

SEC. 229. MAXIMUM LIMITS.

The punishment which a military commission may direct for an offense may not exceed such limits as the President or Secretary of Defense may prescribe for that offense.

(adapted from UCMJ Art. 56)

SEC. 230. EXECUTION OF CONFINEMENT[J16].

Under such regulations as the Secretary of Defense may prescribe, a sentence of confinement adjudged by a military commission may be carried into execution by confinement in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated. Any sentence to confinement will have no effect upon the ability of the United States, in accordance with the law of war, to detain enemy combatants until the cessation of hostilities.

(adapted from UCMJ Art. 58)

SEC. 231. ERROR OF LAW; LESSER INCLUDED OFFENSE.

(a) A finding or sentence of a military commission may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

(b) Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.

(adapted from UCMJ Art. 59)

SEC. 232. REVIEW BY THE CONVENING AUTHORITY.

(a) The findings and sentence of a military commission shall be reported promptly to the convening authority after the announcement of the sentence.

(b) REVIEW BY CONVENING AUTHORITY.—

(1) The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence. Such a submission shall be made within 10 days after the accused has been given an authenticated record of trial.

(2) If the accused shows that additional time is required for the accused to submit such matters, the convening authority, for good cause, may extend the applicable period under paragraph (1) for not more than an additional 20 days.

(3) The accused may waive his right to make a submission to the convening authority under paragraph (1). Such a waiver must be made in writing and may not be revoked. For the purposes of subsection (c)(2), the time within which the accused may make a submission under this subsection shall be deemed to have expired upon the submission of such a waiver to the convening authority.

(c) ACTION BY THE CONVENING AUTHORITY.—

(1) The authority under this section to modify the findings and sentence of a military commission is a matter of ~~command prerogative~~ involving the sole discretion of the convening authority.

(2) Action on the sentence of a military commission shall be taken by the convening authority. Subject to regulations of the Secretary of Defense, such action may be taken only after consideration of any matters submitted by the accused under subsection (b) or after the time for submitting such matters expires, whichever is earlier. The convening authority, in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part. The convening authority may not increase the sentence beyond that which is found by the commission.

(3) Action on the findings of a military commission by the convening authority is not required. However, such person, in his sole discretion, may—

(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or

(B) change a finding of guilty to a charge to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge.

(d) ORDER OF REVISION OR REHEARING.—

(1) The convening authority, in his sole discretion, may order a proceeding in revision or a rehearing.

(2) A proceeding in revision may be ordered if there is an apparent error or omission in the record or if the record shows improper or inconsistent action by a military commission with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused. In no case, however, may a proceeding in revision—

(A) reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty;

(B) reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation;

(C) increase the severity of the sentence unless the sentence prescribed for the offense is mandatory.

(3) A rehearing may be ordered by the convening authority if he disapproves the findings and sentence and states the reasons for disapproval of the findings. If such a person disapproves the findings and sentence and does not order a rehearing, he shall dismiss the charges. A rehearing as to the findings may not be ordered where there is a lack of sufficient evidence in the record to support the findings. A rehearing as to the sentence may be ordered if the convening authority disapproves the sentence.

(adapted from UCMJ Art. 60)

SEC. 233. WAIVER OR WITHDRAWAL OF APPEAL.

(a) In each case subject to appellate review under section 236 or 237 of this chapter, except a case in which the sentence as approved under section 232 of this chapter includes death, the accused may file with the convening authority a statement expressly waiving the right of the accused to such review. Such a waiver shall be signed by both the accused and by a defense counsel and must be filed within 10 days after the action under section 232 of this chapter is served on the accused or on defense counsel. The convening authority, for good cause, may extend the period for such filing by not more than 30 days.

(b) Except in a case in which the sentence as approved under section 233 of this chapter includes death, the accused may withdraw an appeal at any time.

(c) A waiver of the right to appellate review or the withdrawal of an appeal under this section bars review under section 236 or 237 of this chapter.

(adapted from UCMJ Art. 61)

SEC. 234. APPEAL BY THE UNITED STATES.

(a) In a trial by military commission, the United States may take an interlocutory appeal to the Court of Military Commission Review of any order or ruling of the military judge which terminates commission proceedings with respect to a charge or specifications or which excludes evidence that is substantial proof of a fact material in the proceeding. However, the United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty by the commission with respect to the charge or specification.

(b) The United States shall take an appeal by filing a notice of appeal with the military judge within five days after the date of such order or ruling.

(c) An appeal under this section shall be forwarded by means prescribed under regulations of the Secretary of Defense directly to the Court of Military Commission Review. In ruling on an appeal under this section, the Court of Military Commission Review may act only with respect to matters of law.

(adapted from UCMJ Art. 62)

SEC. 235. REHEARINGS.

Each rehearing under this chapter shall take place before a military commission composed of members not members of the commission which first heard the case. Upon a rehearing the accused may not be tried for any offense of which he was found not guilty by the first commission, and no sentence in excess of or more than the original sentence may be imposed unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory. If the sentence approved after the first commission was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with pretrial agreement, the sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first commission.

(adapted from UCMJ Art. 63)

SEC. 235. REVIEW BY COURT OF MILITARY COMMISSION REVIEW.

(a) The Secretary of Defense shall establish a Court of Military Commission Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing military commission decisions, the court may sit in panels or as a whole in accordance with rules prescribed by the Secretary.

(b) The Secretary of Defense shall assign appellate military judges to a Court of Military Commission Review, who may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a State.

(c) Both the accused and the United States, pursuant to section 235, may take an appeal from the final decision of a military commission to the Court of Military Commission Review in accordance with procedures prescribed under regulations of the Secretary of Defense.

(d) In ruling on an appeal under this section, the Court of Military Commission Review may act only with respect to matters of law.

(adapted from UCMJ Art. 66)

SEC. 236. REVIEW BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Pursuant to Section 1005(e)(3) of the Detainee Treatment Act of 2005, the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission. The Court of Appeals shall not review the final judgment until all other appeals under this chapter have been waived or exhausted. The Supreme Court of the United States may review by writ of certiorari the final judgment of the Court of Appeals pursuant to section 1257 of title 28, United States Code.

(adapted from UCMJ Art. 67)

SEC. 237. APPELLATE COUNSEL.

(a) The Secretary of Defense shall, by regulation, establish procedures for the appointment of appellate counsel for the United States and for the accused. Appellate counsel shall meet the qualifications for appearing before military commissions under this chapter.

(b) Appellate counsel may represent the United States in any appeal or review proceeding under this chapter. Appellate Government counsel may represent the United States before the Supreme Court in cases arising under this chapter when requested to do so by the Attorney General.

(c) The accused shall be represented by appellate military counsel before the Court of Military Commission Review, the United State Court of Appeals for the District of Columbia Circuit, or the Supreme Court, or by civilian counsel if provided by him, so long as the civilian counsel meets the qualifications for appearing before military commissions under this chapter.

(adapted from UCMJ Art. 70)

SEC. 239. EXECUTION OF SENTENCE; SUSPENSION OF SENTENCE.

(a) If the sentence of the commission extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit.

(b) If a sentence extends to death, the sentence may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death, approval under subsection (a)). A judgment as to legality of the proceedings is final in such cases when review is completed by the Court of Military Commission Review and—

(1) the time for the accused to file a petition for review by the Court of Appeals for the D.C. Circuit has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court; or

(2) review is completed in accordance with the judgment of the Court of Appeals for the D.C. Circuit and (i) a petition for a writ of certiorari is not timely filed; (ii) such a petition is denied by the Supreme Court; or (iii) review is otherwise completed in accordance with the judgment of the Supreme Court.

(c) The Secretary of Defense or the convening authority acting on the case under section 233 of this chapter may suspend the execution of any sentence or part thereof, except a death sentence.

(adapted from UCMJ Art. 71)

SEC. 240. FINALITY OF PROCEEDINGS, FINDINGS, AND SENTENCES.

(a) The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of military commissions as approved, reviewed, or affirmed as required by this chapter, are final and conclusive. Orders publishing the proceedings of military commissions are binding upon all departments, courts, agencies, and officers of the United States, subject only to action by the Secretary

of Defense as provided in section 240 of this chapter, and the authority of the President.

(b) Except as provided for in this chapter, and notwithstanding any other law, including section 2241 of title 28, United States Code (or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of enactment of this Act, relating to the prosecution, trial, or judgment of a military commission convened under this section, including challenges to the lawfulness of commission procedures.

(adapted from UCMJ Art. 76)

SEC. 241. SUBSTANTIVE OFFENSES.

(a) BACKGROUND.—The following provisions codify offenses that have traditionally been tried by military commissions. This Act does not purport to establish new crimes that did not exist before its establishment, but rather to codify those crimes for trial by military commission and for other purposes under federal law. Because these provisions are declarative of existing law, they do not preclude trial for crimes that occurred prior to their effective date.

(b) The Secretary of Defense may, by regulation, specify other violations of the laws of war that may be tried by military commission, provided that no such offense may be cognizable in a trial by military commission if that offense did not exist prior to the conduct in question.

(adapted from UCMJ subchapter X)

SEC. 242. PRINCIPALS.

Any person punishable under this chapter who—

(a) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission or

(b) causes an act to be done which if directly performed by him would be punishable by this chapter, is a principal.

(adapted from UCMJ Art. 77)

SEC. 243. ACCESSORY AFTER THE FACT.

Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in

order to hinder or prevent his apprehension, trial, or punishment shall be punished as a military commission may direct.

(adapted from UCMJ Art. 78)

SEC. 244. CONVICTION OF LESSER OFFENSE.

An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.

(adapted from UCMJ Art. 79)

SEC. 245. ATTEMPTS.

(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this chapter who attempts to commit any offense punishable by this act shall be punished as a military commission may direct.

~~(b)~~(c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

(adapted from UCMJ Art. 80)

SEC. 246. SOLICITATION.

Any person subject to this chapter who solicits or advises another or others to commit one or more substantive offenses triable by military commission shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a military commission may direct.

(adapted from UCMJ Art. 82)

SEC. 247. CRIMES TRIABLE BY MILITARY COMMISSION.

The following enumerated offenses, when committed in the context of and associated with armed conflict, shall be triable by military commission under this chapter.

(a) DEFINITIONS.—

(1) COMBATANT IMMUNITY.—"Combatant immunity" means the privilege accorded to lawful combatants ~~under the law of~~who are in compliance with the law of war ~~armed conflict~~.

(2) PROTECTED PERSON.—For purposes of this section, "protected person" refers to any person who is protected under one or more of the Geneva Conventions, including those placed *hors de combat* by sickness, wounds, or detention, and medical or religious personnel taking no direct or active part in hostilities.

(3) PROTECTED PROPERTY.— "Protected property" refers to property specifically protected by the law of ~~armed conflict~~war such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected, provide they are not being used for military purposes or are not otherwise military objectives. Such property would include objects properly identified by one of the distinctive emblems of the Geneva Conventions but does not include all civilian property.

(b) OFFENSES IN VIOLATION OF THE LAWS OF WAR.—

(1) WILLFULLY KILLING PROTECTED PERSONS.—Any person who intentionally kills one or more protected persons other than incident to a lawful attack is guilty of the offense of willfully killing protected persons and shall be subject to whatever punishment the commission may direct.

(2) ATTACKING CIVILIANS.—Any person who intentionally engages in an attack upon a civilian population as such or individual civilians not taking direct or active part in hostilities other than incident to a lawful attack is guilty of the offense of attacking civilians and shall be subject to whatever punishment the commission may direct.

(3) ATTACKING CIVILIAN OBJECTS.—Any person who intentionally engages in an attack upon civilian objects (property that is not a military objective) other than incident to a lawful attack shall be guilty of the offense of attacking civilian objects and shall be subject to whatever punishment the commission may direct.

(4) ATTACKING PROTECTED PROPERTY.—Any person who intentionally engages in an attack upon protected property other than incident to a lawful attack shall be guilty of the offense of attacking protected property and shall be subject to whatever punishment the commission may direct.

(5) PILLAGING.—Any person who intentionally and in the absence of military necessity appropriates or seizes property for private or personal use, without the consent of a person with authority to permit such

appropriation or seizure, shall be guilty of the offense of pillaging and shall be subject to whatever punishment the commission may direct.

(6) DENYING QUARTER.—Any person who, with effective command or control over subordinate forces, declares, orders, or otherwise indicates to those forces that there shall be no survivors or surrender accepted, with the intent therefore to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted, shall be guilty of denying quarter and shall be subject to whatever punishment the commission may direct.

(7) TAKING HOSTAGES.—Any person who, having seized or detained one or more persons in violation of the laws of armed conflict, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons, shall be guilty of the offense of taking hostages and shall be subject to whatever punishment the commission may direct.

(8) EMPLOYING POISON OR ANALOGOUS WEAPONS.—Any person who intentionally, as a method of warfare, employs a substance or a weapon that releases a substance that causes death or serious and lasting damage to health in the ordinary course of events, through its asphyxiating, bacteriological, or toxic properties, shall be guilty of employing poison or analogous weapons and shall be subject to whatever punishment the commission may direct.

(9) USING PROTECTED PERSONS AS SHIELDS.—Any person who positions, or otherwise takes advantage of, protected persons with the intent to shield a military objective from attack or to shield, favor, or impede military operations, shall be guilty of the offense of using protected persons as a shields and shall be subject to whatever punishment the commission may direct.

(10) USING PROTECTED PROPERTY AS SHIELDS.—Any person who positions, or otherwise takes advantage of the location of, civilian property or protected property under the law of war with the intent to shield a military objective from attack or to shield, favor, or impede military operations, shall be guilty of the offense of using protected property as shields and shall be subject to whatever punishment the commission may direct.

(11) TORTURE.—Any person who commits an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control shall be guilty of torture and subject to

whatever punishment the commission may direct. "Severe mental pain or suffering" has the meaning provided in 18 U.S.C. § 2340(2).

(12) WILLFULLY CAUSING GREAT SUFFERING OR SERIOUS INJURY.—Any person who intentionally causes serious injury or serious endangerment to the body or health of one or more protected persons shall be guilty of the offense of causing serious injury and shall be subject to whatever punishment the commission may direct.

(13) MUTILATING OR MAIMING.—Any person who intentionally injures one or more protected persons, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose, shall be guilty of the offense of mutilation or maiming and shall be subject to whatever punishment the commission may direct.

(14) USING TREACHERY OR PERFIDY.—Any person who, after inviting the confidence or belief of one or more persons that they were entitled to, or obliged to accord, protection under the law of war, intentionally makes use of that confidence or belief in killing, injuring, or capturing such person or persons, shall be guilty of using treachery or perfidy and shall be subject to whatever punishment the commission may direct.

(15) IMPROPERLY USING A FLAG OF TRUCE.—Any person who uses a flag of truce to feign an intention to negotiate, surrender, or otherwise to suspend hostilities when there is no such intention, shall be guilty of improperly using a flag of truce and shall be subject to whatever punishment the commission may direct.

(16) IMPROPERLY USING A DISTINCTIVE EMBLEM.—Any person who intentionally uses a distinctive emblem recognized by the law of armed conflict for combatant purposes in a manner prohibited by the law of armed conflict shall be guilty of improperly using a distinctive emblem and shall be subject to whatever punishment the commission may direct.

(17) WILLFULLY MISTREATING A DEAD BODY.—Any person who intentionally mistreats the body of a dead person, without justification by legitimate military necessary, shall be guilty of the offense of mistreating a dead body and shall be subject to whatever punishment the commission may direct.

(18) RAPE.—Any person who forcibly or with coercion or threat of force invades the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused or with any foreign object shall be guilty of the offense of rape and shall be subject to whatever punishment the commission may direct.

(19) CONSPIRACY.—Any person who conspires to commit one or more substantive offenses triable under this section, and who knowingly does any overt act to effect the object of the conspiracy, shall be guilty of conspiracy to commit a war crime and shall be subject to whatever punishment the commission may direct[n17].

(c) OTHER OFFENSES TRIABLE BY MILITARY COMMISSION.—

(1) HIJACKING OR HAZARDING A VESSEL OR AIRCRAFT.—Any person not protected by combatant immunity who intentionally seizes, exercises unauthorized control over, or endangers the safe navigation of, a vessel or aircraft that was not a legitimate military target is guilty of the offense of hijacking or hazarding a vessel or aircraft and shall be subject to whatever punishment the commission may direct.

(2) TERRORISM.—Any person not protected by combatant immunity who intentionally kills or inflicts great bodily harm on one or more persons in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be guilty of the offense of terrorism and shall be subject to whatever punishment the commission may direct.

(3) MURDER BY AN UNPRIVILEGED BELLIGERENT.—Any person not protected by combatant immunity who intentionally kills one or more persons, or intentionally engages in an act that evinced a wanton disregard for human life, shall be guilty of the offense of murder by an unprivileged belligerent and shall be subject to whatever punishment the commission may direct.

(4) DESTRUCTION OF PROPERTY BY AN UNPRIVILEGED BELLIGERENT.—Any person not protected by combatant immunity who intentionally destroys property belonging to another person, without that person's consent, shall be guilty of the offense of destruction of property by an unprivileged belligerent and shall be subject to whatever punishment the commission may direct.

(5) WRONGFULLY AIDING THE ENEMY.—Any person who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States or one its co-belligerents shall be guilty of the offense of wrongfully aiding the enemy and shall be subject to whatever punishment the commission may direct.

(6) SPYING.—Any person who collects or attempts to collect certain information, intending to convey such information to an enemy of the United States or one of its co-belligerents, by clandestine means or while

acting under false pretenses, shall be guilty of the offense of spying and shall be subject to whatever punishment the commission may direct.

SEC. 248. PERJURY AND OBSTRUCTION OF JUSTICE.

The military commissions also may try offenses and impose punishments for perjury, false testimony, or obstruction of justice related to military commissions.

(adapted from UCMJ Art. 84)

2 of 5 DOCUMENTS

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HEADLINE: HEARING OF THE SENATE ARMED SERVICES COMMITTEE

SUBJECT: THE FUTURE OF MILITARY COMMISSIONS

CHAIRED BY: SENATOR JOHN WARNER (R-VA)

WITNESSES: ATTORNEY GENERAL ALBERTO GONZALES; DEPUTY DEFENSE SECRETARY GORDON ENGLAND

LOCATION: 216 HART SENATE OFFICE BUILDING. WASHINGTON, D.C.

BODY:

SEN. WARNER: Good afternoon, ladies and gentlemen. We apologize for starting a little after 2:00, but we had a vote. That's the one thing that we have to do here.

So the committee meets today to conduct the third in a series of hearings on the future of military commissions in light of the Supreme Court's decision in Hamdan v. Rumsfeld. We are privileged to have with us the attorney general of the United States, the Honorable Alberto Gonzales, and the deputy secretary of Defense, the Honorable Gordon England. They are accompanied respectively by Mr. Bradbury, acting head of the Justice Department legal office counsel, and Mr. Dell'Orto, deputy general counsel of the Department of Defense.

In two previous hearings, we've had the benefit of the testimony of the judge advocate general of the armed forces, retired judge advocates general, human rights groups and bar associations and academics who specialize in military law.

Today, we hear from the administration on its recommendations for legislation to create new military commissions consistent with -- I'm sorry -- new military commissions consistent with the issues raised by the Supreme Court in the Hamdan decision, both statutory and with respect to Common Article 3 of the Geneva Convention.

We've been in regular consultation, I want to say, Attorney General Gonzales and Secretary England. We've had excellent consultation here in the Senate with your respective departments right along. We understand that the final draft of the administration proposal is still being worked upon, and that's for the good, in my judgment. This is a very important thing.

Nevertheless, it's clear that it would be beneficial for the committee, given that we're about to go on recess, to receive their current status report on this particular piece of legislation. Our committee intends to work with the administration during the August recess with the strong possibility of additional hearings by the committee before we mark-up a bill and report it to the Senate leadership -- bipartisan leadership of the Senate.

I reiterate what I've said before: Congress must get this right. We must produce legislation that provides for an effective means of trying those alleged to have violated the law of war, while at the same time complying with our obligations under international and domestic law. How we treat people in these circumstances will affect the credibility of our country in the eyes of the world.

Thank you.

Senator Levin. Senator Levin, I understand that you have another matter; and therefore, you will combine your opening remarks with a question or two. Am I correct on that?

SEN. CARL LEVIN (D-MI): Well, I'd be happy to do that, but I probably -- we should get the statements first from our witnesses, and then if you would allow me to ask questions first I would appreciate it.

SEN. WARNER: I would be happy to do that.

SEN. LEVIN: Thank you, Mr. Chairman.

And first, let me thank our attorney general and Deputy Secretary England very much for being here.

The Supreme Court's decision in the Hamdan case struck down the military commission procedures established by the administration, because they did not meet the standards of the Uniform Code of Military Justice or those of the Geneva Conventions. Congress has now begun the process of determining what needs to be done to ensure that our system for trying detainees for crimes meets the standards established by the Supreme Court as the law of the land.

We started this process where it should begin, with the military lawyers who are most familiar with the rules for courts martial and the history and practice of military commissions. These officers also understand the practical importance of our adherence to American values and the rule of law in the treatment of others. If we torture of mistreat persons whom we detain on the battlefield or if we proceed to try detainees without fair procedures, we increase the risk that our own troops will be subject to similar abuses at the hands of others.

Today we continue our review by hearing the views of senior administration officials. Last week, a copy of an early draft of an administration proposal was leaked to the press and has been widely circulated. This draft has now been posted on The Washington Post website. We understand that this draft is still evolving, so I will base my questions on the earlier leaked version of the document. I don't know what else to do. It's either that or on the evolving version which apparently we've had some briefing on, but I think it's wiser to base questions on what we know was a draft rather than to speculate.

So the draft and the process through which it was developed will provide some insight into the administration's approach to this issue.

First, the administration seems to have used the UCMJ as a starting point for its draft. While there are extensive departures from the UCMJ, without any demonstration of practical necessity in my judgment, I do welcome the administration's apparent acknowledgment that the UCMJ is in fact the appropriate starting point for military commission legislation.

As the Supreme Court held in the Hamdan case, the regular military courts in our system are the courts martial established by congressional statutes and a military commission can be regularly constituted by the standards of our military justice system only if some practical need explains deviation from the court martial practice.

Second, the Hamdan court also ruled that, quote, "the rules set forth in the manuals for court martial must apply to military commissions unless impracticable," to use their word. Unfortunately, the administration draft takes just three sentences to dismiss both the manual for courts martial and the military rules of evidence. The draft authorizes the secretary of Defense to prescribe procedures, including modes of proof for trials by commissions. It then provides that, quote, "evidence in a military commission shall be admissible if the military judge determines that the evidence is relevant and is a probative value," close quote. And, quote, "hearsay evidence shall be admissible in the discretion of the military judge unless the circumstances render it unreliable or lacking in probative value," close quote. That is virtually unchanged from the evidentiary standard that the Supreme Court rejected in the Hamdan case.

There are undoubtedly parts of the manual for courts martial and the military rules of evidence that would be impractical to apply to military commissions for the criminal trial of detainees. In accordance with the Supreme Court's ruling, however, these areas should be identified by exception rather than by a wholesale departure from all procedures and all rules of evidence applicable in courts martial.

Mr. Chairman, our committee, I believe, should now ask our military lawyers to systematically review the manual for courts martial and the military rules of evidence and make recommendations as to the areas in which deviations are needed on the basis of the Supreme Court's test of impracticability. We already have a Joint Service Committee on Military Justice, which is responsible for reviewing proposed changes to the UCMJ and the manual for courts martial.

And it would be well suited to this new task should our chairman make that decision to assign that task or request them to undertake it.

Third, we've been told that the administration's working draft has now been provided to the judge advocates general of the military services and that some of their comments have already been incorporated into the draft. This is a considerable improvement over the manner in which the administration adopted its previous order on commissions when, we have been told, none of the recommendations of the judge advocates general were adopted. But it still puts the cart before the horse. Rather than asking the judge advocates general to comment on a draft that was prepared by a limited circle of political appointees, the administration should have allowed the experts -- the military lawyers -- to prepare the initial drafts of the proposal.

Mr. Chairman, regardless of whether the administration will listen to the concerns of the judge advocates general in this issues, we should. So far, this committee has addressed this issue in a systematic, deliberative manner. I commend our chairman for doing so, and I know we're going to continue to do so.

I hope that as soon as we receive a formal proposal from the administration that we will reconvene the panel from our first hearing so that those distinguished military officers will have a full opportunity to provide us their views on the administration proposal and their own recommendations as to how we should proceed on this issue.

Finally, the draft on The Washington Post website contains some of the same objectionable language regarding coerced testimony as the original military order. The draft language states, quote, "no otherwise admissible statement obtained through the use of" -- and then there's a word that's blacked out -- "may be received in evidence if the military judge finds that the circumstances under which the statement was made render it unreliable or lacking in probative value." Given the administration's long-standing position on this issue, it seems likely that -- and I'll ask the attorney general about this -- that the word that had been blacked out is coercion, and that this provision is intended to expressly permit the use of coerced testimony under the circumstances identified in that draft.

If so, the provision leaves the door open for the introduction of testimony obtained through the use of techniques such as water boarding, intimidating use of military dogs and so forth. Techniques which our top military lawyers said are inconsistent with the standards of the Army field manual and Common Article 3 of the Geneva Conventions.

The use of evidence obtained through such techniques in a criminal trial would be inconsistent with the Supreme Court's ruling in the Hamdan case, inconsistent with the requirements of the Geneva Conventions, inconsistent with our values as Americans and not of the best interest of U.S. servicemen and women who may one day be captured in combat. If the administration insists on including this provision in its draft legislation, I hope that we will reject that language.

Mr. Chairman, we need to develop a workable framework for the trial of detainees by military commissions consistent with the ruling of the Supreme Court in Hamdan, and that is what we are about. And as you say, Mr. Chairman, it is important that we develop a workable framework for the trial of detainees by military commission. It's important that we be consistent with the ruling of the Supreme Court. And it's important that we do it right. This will be a very difficult endeavor, requiring us to address a series of controversial issues such as the use of classified information, the use of hearsay evidence, the applicability of manual for courts martial and the military rules of evidence and the definition of substantive offenses tryable by military commissions.

I hope we will not open up other issues, as important as they are, because this task is difficult enough. The proper treatment of detainees, the role of combatant status review tribunals, and habeas corpus rights of detainees, that are a very difficult issue and that were debated in the context of last year's Detainee Treatment Act, need to be addressed but not, it seems to me, if we're going to make progress on this critical issue that is before us. And so, I hope that we'll avoid that pitfall by keeping our legislative focus on the issues that we must address, which is to establish a workable framework for military commissions.

Thank you, again, Mr. Chairman, for your position that you've taken in this matter, that we're going to do this thing thoroughly and properly and thoughtfully. I think it's the right way to do.

SEN. WARNER: Well, I want to say that I can't account for all of the websites and various things that are popping up. But the purpose of this hearing is to receive the work in progress and the current status of the thinking of the administration from the two most qualified people, the attorney general and the deputy secretary, to give us the facts.

I don't want to start prejudging this situation based on what might be in websites and other things.

Senator McCain, you've taken the lead on this from the very beginning. Do you have a few opening comments you'd like make?

SEN. JOHN MCCAIN (R-AZ): No, Mr. Chairman.

I'd like to repeat what I said at the beginning of this odyssey that we're on, and that is that we have to look at the best way we can protect America as our first and foremost priority.

I believe we also should comply as much as possible with the United States Supreme Court decision so that we won't have a situation evolve where we pass legislation that the Supreme Court then bounces back to us. It's not good for the process, it's not good for America.

And third of all, I don't think we can ignore in our discussions, in our deliberations, the damage that has been done to the image of the United States of America because of allegations, either true or false, about our treatment of prisoners. And if we are in a long struggle, part of that struggle is a psychological one, and we must remain the nation that is above and different from those of our enemies -- than our enemies. And I think that's important to keep that in mind as we address this issue in its specifics.

But the other fact is that we're in a struggle that engages us in every way, and without the moral superiority that this nation has enjoyed for a couple a hundred years, we could do great damage to our effort in winning this struggle that we're engaged in.

I thank you, Mr. Chairman.

SEN. WARNER: Thank you very much, Senator.

Senator Lindsey Graham, you likewise have taken a lead on this. Do you have any comments for the opening?

SEN. LINDSEY GRAHAM (R-SC): No, sir.

SEN. WARNER: Any other colleagues seeking recognition?

Yes, Mr. Dayton.

SEN. MARK DAYTON (D-MN): Mr. Chairman, I just wanted to salute Senator McCain for his comments. I think they're perfectly said.

SEN. WARNER: I thank the senator.

General, delighted to have you here today and fully recognize that this is an interim report on your part. And as Senator Levin suggested, we will certainly have additional hearings, at which time you will be given the opportunity to come before us.

ATTY GEN. GONZALES: Thank you, Mr. Chairman, Senator Levin and members of the committee.

I am pleased to appear today on behalf of the administration to discuss the elements of the legislation that we believe Congress should put in place to respond to the Supreme Court's decision in Hamdan versus Rumsfeld.

Let me say a word about process first. As this committee knows, the administration has been working hard on a legislative proposal that reflects extensive interagency deliberations as well as numerous consultations with members of Congress. Our deliberations have included detailed discussion with members of the JAG corps, and I personally met twice with the judge advocates general. They have provided multiple rounds of comments, and those comments will be reflected in the legislative package that we plan to offer for Congress' consideration.

Mr. Chairman, first and foremost, the administration believes that Congress should respond to Hamdan by providing statutory authorization for military commissions to try captured terrorists for violations of the laws of war. Fundamentally, any legislation needs to preserve flexibility in the procedures for military commissions while ensuring that detainees receive a full and fair trial.

We believe that Congress should enact a new code of military commissions modeled on the court-martial procedures of the Uniform Code of Military Justice that would follow immediately after the UCMJ as a new chapter in Title 10 of the U.S. Code. The UCMJ should constitute the starting point for the new code.

At the same time, the military commission procedures should be separate from those used to try our own service members, both because military necessity would not permit the strict application of all court-martial procedures and

because there are relative differences between the procedures appropriate for trying our service members and those appropriate for trying the terrorists who seek to destroy us. Still, in most respects, the new code of military commissions can and should track closely the UCMJ.

We would propose that Congress establish a system of military commissions presided over by military judges with commission members drawn from the armed forces. The prosecution and defense counsel would be appointed from the JAG corps, and the accused may retain a civilian counsel in addition to military defense counsel. Trial procedures, sentencing and appellate review would largely track those currently provided under the UCMJ.

Because of the specific concerns raised by the Supreme Court in Hamdan and elsewhere, the new code of military commissions should depart in significant respects from the existing military commission procedures. In particular, we propose that the military judge would preside separate and apart from the other commission members, and make final rulings at trial on law and evidence, just as in courts-martial or civilian trials. We would increase the minimum number of commission members to five and require 12 members for prosecutions seeking the death penalty.

And while military commissions will track the UCMJ in many ways, commission procedures should depart from the UCMJ in those instances where the UCMJ provisions would be inappropriate or impractical for use in the trial of unlawful terrorist combatants. The UCMJ provides Miranda-type protections for U.S. military personnel that are broader than the civilian rule and that could impede or limit evidence obtained during the interrogation of terrorist detainees. I have not heard anyone contend that terrorists should be given the Miranda warnings required by the UCMJ.

The military commission procedures also should not include the UCMJ's Article 32 investigations, which is a pre-charging proceeding that is akin to but considerably more protective than a civilian grand jury. Such a proceeding is unnecessary before the trial of captured terrorists who are already subject to detention under the laws of war.

Because military commissions must try commission -- must try crimes based on evidence collected everywhere from the battlefields in Afghanistan to foreign terrorist safehouses, the commission should permit the introduction of all probative and reliable evidence, including hearsay evidence. It is imperative that hearsay evidence be considered because many witnesses are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury or death.

The UCMJ rules of evidence also provide for circumstances where classified evidence must be shared with the accused. I believe there is broad agreement that in the midst of the current conflict, we must not share with captured terrorists the highly sensitive intelligence that may be relevant to military commission proceedings.

A more difficult question is posed, however, as to what is to be done when that classified evidence constitutes an essential part of the prosecution's case. In the court-martial context, our rules force the prosecution to choose between disclosing the evidence to the accused or allowing the guilty to evade prosecution. It is my understanding that other countries, such as Australia, have established procedures that allow for the court, under tightly defined circumstances, to consider evidence outside the presence of the accused. The administration must -- and Congress must give careful thought as to how the balance should be struck for the use of classified information in the prosecution of terrorists before military commissions.

Mr. Chairman, the administration also believes that Congress needs to address the Supreme Court's ruling in Hamdan that Common Article 3 of the Geneva Conventions applies to our armed conflict with al Qaeda. The United States has never before applied Common Article 3 in the context of an armed conflict with international terrorists. Yet, because of the court's decision in Hamdan, we are now faced with the task of determining the best way to do just that.

Although many of the provisions of Common Article 3 prohibit actions that are universally condemned, some of its terms are inherently vague, as this committee already discussed in its recent hearing on the subject. Common Article 3 prohibits "outrages upon personal dignity," a phrase of uncertain and unpredictable application. If left undefined, this provision will create an unacceptable degree of uncertainty for those who fight to defend us from terrorist attack, particularly because any violation of Common Article 3 constitutes a federal crime under the War Crimes Act.

Furthermore, because the Supreme Court has said that courts must give respectful consideration and considerable weight to the interpretations of treaties by international tribunals and other state parties, the meaning of Common Article 3 -- the baseline standard that now applies to the conduct of U.S. personnel in the war on terror -- would be informed by the evolving interpretations of tribunals and governments outside the United States.

We believe that the standards governing the treatment of detainees by United States personnel in the war on terror should be certain. And those standards should be defined clearly by U.S. law, consistent with our international obligations. One straightforward step that Congress can take to achieve that result is to define our obligations under Common Article 3 by reference to the U.S. constitutional standard already adopted by Congress.

Last year, after a significant public debate, Congress adopted the McCain amendment as part of the DTA. That amendment prohibits cruel, inhumane or degrading treatment or punishment as defined by reference to the established meaning of our Constitution. Congress rightly assumed that the enactment of the DTA settled questions about the baseline standard that would govern the treatment of detainees.

The administration believes that we owe it to those called upon to handle detainees in the war on terror to ensure that any legislation addressing the Common Article 3 issue will bring clarity and certainty the War Crimes Act. And the surest way to achieve this, in our view, is for Congress to set forth a definite and clear list of offenses serious enough to be considered war crimes, punishable as violations of Common Article 3 under 18 USC 2441.

The difficult issues raised by the court's pronouncement on Common Article 3 are ones that the political branches need to consider carefully as they chart way forward after Hamdan.

I look forward to discussing these subjects with the committee this afternoon.

SEN. WARNER: Thank you very much, General. It seems to me to be a statement that is a good way to start this hearing. You've laid it out, I think, with some clarity here now.

ATTY GEN. GONZALES: Thank you, Mr. Chairman.

SEN. WARNER: Secretary England.

MR. ENGLAND: Chairman Warner, Senator Levin, members of the committee, first of all, thanks for the opportunity to be here. This is indeed a crucial subject.

This is also a critical time for America. We are in a real and a daily war against terrorist adversaries who are determined to destroy our way of life and that of our friends and allies. The terrorists are relentless, they oppose the very notion of freedom and liberty, and they are committed to using every possible means to achieve their end.

America did not choose this fight and we don't have the option of walking away. As a nation, we must be clear in our thoughts, candid in our words, and rock solid in our resolve.

The security challenges this nation faces in the wake of 9/11 are both complex and, in some respects, fundamentally new. The Supreme Court's Hamdan decision provides an opportunity for the executive and legislative branches to work together to solidify a legal framework for the war we are in and for future wars.

The legal framework we construct together should take the law of war, not domestic, civilian criminal standards of law and order, as its starting point.

I propose the following seven criteria against which any proposed legislation should be measured.

First, all measures adopted should reflect American values and standards.

Second, persons detained by the armed forces should always be treated humanely, without exception.

Third, our men and women in uniform must have the ability to continue to fight and win wars, including this war on terror. The nation must maintain the ability to detain and interrogate suspected terrorists, to continue to detain dangerous combatants until the cessation of hostilities, and to gather and protect critical intelligence.

Fourth, war criminals need to be prosecuted, and in a full and fair trial.

Fifth, our soldiers, sailors, airmen, Marines and Coast Guardsmen need adequate legal protections, as do the civilians who support them.

Sixth, the rules must be clear and transparent to everyone.

And lastly, we should be mindful of the impact of our legislation on the perceptions of the international community.

I do thank this committee for taking time to thoughtfully consider this very important set of issues. And I do thank you for your strong, unwavering support for the brave men and women serving every day at home and abroad to protect and defend this truly great nation.

SEN. WARNER: Thank you, Mr. Secretary. I think your statement's very helpful and we are off to a good start.

And I'd put my first question to you, Secretary England. And that's the Army Field Manual. It seems to me that that has some relevance to those of us, both administration and the Congress, that are working towards drawing up this statute, and it would be in the interest of all parties to have that before we finalize such proposals as we write into law.

MR. ENGLAND: Mr. Chairman, we do have an Army Field Manual today. It's the version of the Army Field Manual, I think, that goes all the way back to 1992.

SEN. WARNER: I'm familiar with that, yes.

MR. ENGLAND: And we were in the process of, frankly, updating that. We are very close, I believe have been very close to a resolution, but each time, it seems that something else comes up we need to consider; in this case, of course, the Hamdan decision. So we are very close to finalizing the manual. I would expect we would now finalize it when this law is complete and on the books.

SEN. WARNER: You would want the law to be adopted by the Congress before you promulgate the revised edition? Is that your thought?

MR. ENGLAND: Well, that's at least my initial thought, Senator. I guess I have to consider it, but sitting here, it would seem logical to me based on where we are today to complete this discussion of Common Article 3 and to make sure we're all in agreement in terms of how we go ahead. That said, I will tell you we're very close to the Field Manual. But at this point, that would be my initial reaction. I'd be happy to get back with you and discuss it further, but at least initially, that would seem logical to me, sir.

SEN. WARNER: I think it does require further discussion and consideration because I anticipate that at some point in time -- and let's work back from the fact that we're out of here on the 30th of September. And it's the desire of this committee, and we're supported by the bipartisan leadership of the Senate, to get this bill enacted by the Senate and hopefully over to the House such that it can become law.

MR. ENGLAND: I don't --

SEN. WARNER: Men and women of the armed forces need this.

Now, I will just take this under advisement. I'll accept your statement as it is now, and we'll discuss it further. I just wondered what view you might have on that, attorney general, the desirability of waiting till we're finished on this prior to finalizing the revision of the field manual.

ATTY GEN. GONZALES: Sir, I'm not privy to the process in terms of either -- the finalization of the Army field manual. I can only imagine, however, that those -- that those involved in that process have likewise been involved in the process of its legislation. And we have received, are continuing to receive input about what these procedures for the military commission should look like. And I have received and am continuing to receive input with respect to our obligations under Common Article 3. And so, I don't know whether or not we need to have one completed before the other, quite frankly. I think -- you know, I will obviously defer to this committee in terms of what you need, but -- but I'm not sure that they're necessary intertwining in terms of moving forward.

SEN. WARNER: Well, let's all deliberate on this.

Did you wish to have something further to say, Secretary England?

MR. ENGLAND: No, Mr. Chairman, except I didn't understand the relationship between the field manual and this pending legislation. So -- and I guess I still don't understand that relationship. We are working on the field manual. We have been working on the field manual --

SEN. WARNER: I understand that.

MR. ENGLAND: And that was really an independent action from this legislation. So I'm not quite sure how they're connected. I mean, if they are related, then we will definitely work those in some coherent manner.

SEN. WARNER: I think there is a relationship, and we'll discuss this further.

MR. ENGLAND: Okay. We'll be -- we'll be happy to do that, Mr. Chairman.

SEN. WARNER: Let's turn to the question of the classified information. The present military commission rules allow the appointed authority or the presiding officer of the commission to exclude the accused and the civilian counsel from access to evidence during proceedings that these officials decide to close to protect classified information or for other named reason. In your opinion, can a process that passes constitutional and statutory muster -- and that's the bottom line; we got to pass that. If we do not, we still have a federal court set aside this law once we put it into action.

So I repeat, in your opinion, can a process that passes constitutional and statutory muster be constructed without giving the accused and counsel possessing the necessary clearances access to such material in some form?

ATTY GEN. GONZALES: Of course. Mr. Chairman, we're not proposing that classified information be denied to cleared counsel. And I think it would be an extraordinary case when -- where classified information would be used and would not be provided to the accused. Based upon conversations that have occurred between you individually, and I understand based upon a hearing that occurred in the Senate Judiciary Committee, I think it's fairly obvious that this is one of the -- the remaining points of discussion, major points of discussion within the administration is to how to resolve this issue. I think we all agree that we cannot provide terrorists access to classified information. And so, how do we go about moving forward with the prosecution? Because, sure, we have the option to continue to hold them indefinitely for the duration of the hostilities, but we may choose -- we want to -- we may choose to bring someone to justice.

And the classified information may be crucial to that prosecution.

So there are various things that are being discussed with the administration. We could have, for example, the military judge make a finding that moving forward without providing the classified information to the accused is absolutely warranted. We could have a finding that the military -- the military judge could make a finding that, you know -- that substitutes or summaries are inadequate. We could require the military judge to make a finding that moving forward without having the accused present is warranted, given the circumstances.

So there are various things, I think, that we can do, certain procedures that have to be followed, so that we make this an extraordinary case.

But Mr. Chairman, it cannot be the case that in making a decision to move forward with a prosecution, that we have to provide classified information to a terrorist.

And so this is an issue that we're wrestling with. There's no question about that.

SEN. WARNER: Right.

ATTY GEN. GONZALES: And I think that this is something we will value the committee input --

SEN. WARNER: We haven't reached a final decision on how we're going to handle it. But I've pointed out, I think, the importance of having this statute be able to survive any subsequent federal court review process.

ATTY GEN. GONZALES: If I can make two final points again --

SEN. WARNER: Sure.

ATTY GEN. GONZALES: -- the -- his -- the counsel would be -- would have access -- the cleared counsel would have that access to the information. And there could be a mechanism, again, where we could provide either redacted summaries or something as a substitute to the accused that would not jeopardize the national security of our country.

SEN. WARNER: On the subject of hearsay evidence, given the difficulties of locating and obtaining witnesses in cases of this sort, do you believe that it would be reasonable to admit hearsay if it were not coerced and, in the opinion of a military judge or other judicial officer, there were sufficient guarantees for its veracity? In your opinion, would the admission of such evidence raise constitutional questions?

ATTY GEN. GONZALES: In my judgment, it would be permissible. The admissions of hearsay evidence has been used in other international tribunals, in Yugoslavia and Rwanda.

This is a different kind of conflict. It's an ongoing kind of conflict, where the witness or the evidence -- oftentimes it's hard to verify or hard to have firsthand access to. The witness may be out of the country, and therefore we can't serve process. The witness -- for security reasons, we may want them -- to bring them into Guantanamo. The witness may be dead. The witness may be on the front line. And do we want to be bringing our soldiers off the front line?

And so I think the -- that there are very good reasons, practical reasons, necessary reasons to deviate from the Uniform Court (sic) of Military Justice with respect to the use of hearsay.

It's vitally important, however, that the information be probative and that it be reliable.

And these decisions will be made by military judges who have been trained, and I think we all have great confidence in their wisdom and judgment. And -- but I think that the use of hearsay is absolutely important in these kind of proceedings.

SEN. WARNER: Thank you very much.

Senator Levin.

SEN. LEVIN: Thank you, Mr. Chairman.

The Supreme Court in Hamdan held that Common Article 3 of the Geneva Conventions applies to the conflict with al Qaeda. Secretary England, on July 7th, you issued a memorandum acknowledging this holding and said that the Supreme Court has determined that Common Article 3 applies, as a matter of law, to the conflict with al Qaeda.

The court found that the military commissions, as constituted by the Department of Defense, are not consistent with Article 3. And then, you went on to say the following, that all DOD personnel adhere to these standards.

Do you stand by that memorandum?

MR. ENGLAND: Yes, sir, I do.

SEN. LEVIN: And Attorney General Gonzales, do you agree with that memorandum?

ATTY GEN. GONZALES: Sir, I can't admit to having read the entire thing, but I agree with what you've read, yes, sir.

SEN. LEVIN: And would you agree in light of the Supreme Court's ruling that legislation authorizing the use of the commissions and procedures for such commissions must be consistent with the requirements of Common Article 3?

ATTY GEN. GONZALES: Yes, sir, I would.

SEN. LEVIN: Mr. Attorney General, do you believe that the use of testimony which is obtained through techniques, such as waterboarding, stress positions, intimidating use of military dogs, sleep deprivation, sensory deprivation, forced nudity -- that techniques such as I just described would be consistent -- do you believe they would be consistent with Common Article 3?

ATTY GEN. GONZALES: Well, sir, I think most importantly I can't imagine that such testimony would be reliable, and therefore, I find it unlikely that any military judge would allow such testimony in his evidence.

SEN. LEVIN: And that would be because you -- it's hard for you contemplate or conceive of such testimony being consistent with Common Article 3?

ATTY GEN. GONZALES: Sir, it would certainly be -- it -- in my judgment, it would -- there would be serious questions regarding the reliability of such testimony and therefore should not be admitted and would not be admitted under the procedures that we're currently discussing.

SEN. LEVIN: Secretary England, if such procedures were used against our own soldiers, testimony that was obtained through the use of those kind of techniques, would you accept such judgment if it were rendered against one of our troops?

MR. ENGLAND: Again, I would concur with the attorney general. I mean, hopefully that would not be permissible in a court, Senator Levin. So hopefully, it would not be used against them.

SEN. LEVIN: The -- in terms of the rule of evidence, Mr. Attorney General, Justice Kennedy assessed that it be feasible to apply most, if not all, of the conventional military evidence rules and procedures. Would you agree that most at least of the conventional military evidence rules and procedures are feasible for use in these commissions?

ATTY GEN. GONZALES: Certainly, sir, I think that -- well, first of all, let me -- let me make one observation. I think there was a difference of opinion about how to read some of these opinions. I think what the court was saying is that if the president wants to deviate, wants to use procedures inconsistent, that are not uniform with the Uniform Code

of Military Justice, then he has to have practical reasons for doing so. The UCMJ is a creature of Congress. If Congress wants to change a procedure, I think Congress has the ability under the Constitution to do that.

And I'm sorry, Senator, I forgot your question, and I apologize.

SEN. LEVIN: Do you believe it would be feasible, the way Justice Kennedy uses the word "practicability," for most, if not all -- let's say most -- of the conventional military evidence rules and procedures to be followed in commissions?

ATTY GEN. GONZALES: Again, Senator, without going through an itemized list of the procedures or rules that you're referring to, the objective that we would hope to achieve is the ability to get into evidence information that may be, quite frankly, not admissible in the Uniform Code of Military Justice, not admissible in our criminal courts, because we are fighting a new kind of war and we are talking about information that may be much more difficult to obtain. And so again, that would be our objective. And obviously, we're willing to sit down, be happy to sit down with you to talk about specific procedures.

SEN. LEVIN: We were told by, I think, one of our colleagues a week ago or so that there's a list of items in the rules of evidence which are not practical to be followed. Is there such a list that's already been created? Do either of you know?

ATTY GEN. G0NZALES: I'm not aware -- I'm not aware of such a list, Senator. I do know that obviously we've looked very hard at the Uniform Code of Military Justice and to look to see what makes sense, what continues to make sense in fighting -- in bringing to justice al Qaeda, and what things should change in order to successfully prosecute --

SEN. LEVIN: But is there a list of items?

ATTY GEN. GONZALES: Sir, I'm not aware of a specific list that you're referring to.

SEN. LEVIN: All right. Well, I'm not -- I think it was referred to here by one of our colleagues.

Secretary England, are you familiar with --

MR. ENGLAND: No, sir, I'm not.

SEN. LEVIN: If you could check it out? If there is such a list, could you --

ATTY GEN. GONZALES: Sir, there may be a list.

SEN. LEVIN: -- share it with us? Would you share it with us?

ATTY GEN. GONZALES: I'll be happy to see what we can do, sir.

SEN. LEVIN: Attorney General Gonzales, in your prepared statement you say that military commissions must permit the introduction of a broader range of evidence, including hearsay statements, because many witnesses are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury or death. Would you agree that legislation should allow or require the presence of a witness, if that witness is available, instead of using hearsay?

ATTY GEN. GONZALES: Sir, it depends on what you mean, "if the witness is available."

SEN. LEVIN: Well, you gave examples of where, you know, witnesses may not be available. You talk about incarceration. Say incarcerations in our jail. Should that person be presented?

ATTY GEN. GONZALES: I think that would be an instance where I think it would be more difficult, certainly, to argue this person is not available. I'm talking about someone who is in a foreign country and we cannot reach.

SEN. LEVIN: So you would prefer the presence of a witness to hearsay.

ATTY GEN. GONZALES: Absolutely, sir. But again, if it means we take one of our soldiers off the front lines, I question whether or not that's the right approach that this Congress should be considering.

SEN. LEVIN: My time is up. Thank you very much, both of you.

SEN. WARNER: Senator Inhofe?

SEN. JAMES INHOFE (R-OK): Thank you, Mr. Chairman. And as I've said before, I respect the judgment of you as chairman and the majority members of this committee to hold these hearings, although my feeling is it's premature and we should not even be having this hearing today. Senator Levin in his opening remarks referred to information that we're working on as work in progress or leaked information. I would prefer to have something in front of me that conforms to the successes that we've had in the commissions and tweaked to take care of the problem with the United States Supreme Court.

So I really don't have any questions for you. I just would like to have you keep in mind as you continue with this -- as one member of this committee who doesn't believe we should be doing this and yet I realize we have to come up with something -- that you keep in mind that my wishes would be we want to make sure that the president is able to effectively and successfully execute this next generation international war. I want to equip and protect our military as it carries out the war. I want to enact legislation that is designed to help us win. I want terrorists destroyed and locked up for good. Senator (Cornyn ?) brought up something on the courts of the world in a previous hearing. I agree with that. He said that I don't trust our national interests in security in some of the hands of -- in the hands of some of these national courts.

I'm interested in terms of the attorney-client privileges that -- I want to make sure that we have everything in place here in Congress to make sure that the attorney-client privileges are not given to the detainees, at least not to the extent that they be to American citizens.

As far as the right to trial of terrorists, I know the UCMJ Article 10 requires immediate steps to be taken to charge and try detainees, and if not, release them. On the other hand, we know that the 3rd Geneva Convention allows countries to hold POWs until the end of the conflict, and it doesn't require a trial. I kind of agree to something that Senator Clinton said during the last hearing. She said, you know, hey, we can just hold them, we don't have to try them.

The right to classified information, I just feel that -- still have to be convinced that the terrorists will truly be prevented from seeing or hearing classified information. I think you made that pretty clear in your opening remarks, both of you. And so I -- but I concur in that. So.

I guess in summary, I just think that if we would take what I think has been working well up to now, put that down, figure out a way to offset the objections that came in the Supreme Court ruling and get on with this thing.

Thank you, Mr. Chairman.

SEN. WARNER: Senator Dayton.

SEN. MARK DAYTON (D-MN): Thank you, Mr. Chairman.

Mr. Attorney General, in your written statement, page 7, you say, quote, "It is fair to say that the United States military has never before been in a conflict in which it applied Common Article 3 as the governing detention standard" --

ATTY GEN. GONZALES: Against international terrorists.

SEN. DAYTON: Well, that's not what your statement says, sir.

ATTY GEN. GONZALES: That's my statement, sir.

SEN. DAYTON: All right. And so now the Supreme Court's ruling, you concur, extends that requirement?

ATTY GEN. GONZALES: Sir, I believe -- I believe the Supreme Court has told us that Common Article 3 does apply to United States' conflict with al Qaeda. And now we need -- now the Congress and the president need to decide what does that mean for the United States moving forward.

I happen to believe, as I indicated in my opening remarks, that there is a degree of uncertainty because some of the language in Common Article 3. I personally feel that we have an obligation for those folks who are fighting for America to try to eliminate that uncertainty as much as we can. And one way to do that is to define what our obligations are under Common Article 3 by tying it to a U.S. constitutional standard, which was recognized by Congress in connection with the McCain Amendment and the Detainee Treatment Act. And so I -- that is the proposal of the administration.

SEN. DAYTON: Mr. Secretary, your directive that you issued on July 7th of this year -- I'm summarizing here, but it confirms DOD's obligation to comply with Common Article 3, it makes it clear that Department of Defense policies, directives, executive orders and doctrine already comply with the standards of Common Article 3. When the judge ad-

vocate generals of the armed forces were asked about this directive at one of our hearings on July 13th, Admiral McPherson stated, quote, "It created no new requirements for us.

We have been training to and operating under that standard for a long, long time." General Romig stated, "We train to it; we always have." Is that an accurate reflection of both your directive and your understanding of prior training and procedures?

MR. ENGLAND: Senator, yes, it is. The fact is in my July 7th letter I had commented that it was my understanding that aside from the military commission procedures, that all the orders, policies, directives are already in compliance with Common Article 3. And I then ask everyone throughout the Department of Defense to look at their own procedures, policies, et cetera that they were implementing and to provide and enter back to the department to reaffirm that they were, indeed, in compliance with Common Article 3. At this point, we've had responses from, oh, perhaps three-quarters of all the entities within the department. And they have all complied in the affirmative, and I expect that the rest of the department will also apply (sic) in the affirmative, but we have not heard back from everybody at this time, Senator.

SEN. DAYTON: Okay. Well, I'm --

ATTY GEN. GONZALES: Senator, may I add something, if you don't mind?

SEN. DAYTON: Yes, sir.

ATTY GEN. GONZALES: It's my understanding -- and obviously the deputy secretary would know much better than I, but reading the transcript when the JAGs were up before this committee, I think they all said we train to Geneva. They didn't say that they trained to Common Article 3. They said they train to the standards of Geneva, which are higher than Common Article 3. And I believe that at least one of the JAGs responded when asked are there any manuals or booklets or anything relating to Common Article 3, the answer was no, because they don't train to Common Article 3. I think they train to something higher. And so, when you ask them, well, what is -- what are your obligations, what is the standard under Common Article 3, I don't think they can give you an answer.

SEN. DAYTON: Sir, if they train to a higher standard, then all the better, it seems to me. And I'm, you know, glad to clarify that, also clarify your written statement here because, I mean, I just was very surprised that you would say that we've never before been in a conflict and we should have applied United States military Common Article 3 as the governing detention standard, including conflicts against irregular forces such as the Viet Cong and those in Somalia and other places. So I think that's an important clarification. I thank you for that.

ATTY GEN. GONZALES: Thanks for the opportunity.

SEN. DAYTON: Thank you. May I ask you also, Mr. Attorney General, in your --

SEN. WARNER: Let me interrupt.

Have you had sufficient opportunity to correct what you feel is an omission in that statement?

ATTY GEN. GONZALES: I have. Thank you. Thank you, Mr. Chairman.

SEN. WARNER: Fine. Thank you.

SEN. DAYTON: Mr. Attorney General, in your -- in your testimony you stated, if I'm quoting you correctly, that we -- you don't want to allow the accused to escape prosecution. And I would certainly concur with that statement. We were also told -- and I'm not an attorney. So forgive me here. But the Judge Advocate Generals told us that even if somebody for any reason cannot be prosecuted, they can be detained indefinitely until the cessation of hostilities. That's explicitly provided for in the Geneva Convention, and that's, you know, standard practice elsewhere.

So, I just wanted to clarify, because I think not yourselves there, but others around this subject have created a false impression that if these individuals can't be prosecuted, then they're going to be released back to their countries or into the general population. Is that -- ?

ATTY GEN. GONZALES: That is an -- that is an excellent point, Senator. This was -- this was another -- again, another issue that was raised when the JAGs were last here. I think Senator Graham is the one that actually pointed it out in connection with an exchange with Senator Clinton. Clearly, we can detain enemy combatants for the duration of the hostilities. And if we choose to try them, that's great.

If we don't choose to try them, we can continue to hold them.

SEN. DAYTON: Well, you're correct. I should have properly credited my colleague, Senator Clinton, for pointing that out, and it brings up the old adage that, you know, if you take it from one person, it's plagiarism, from many people, it's research. So I -- I'm glad you clarified that.

There was an article in last Friday's Washington Post that talks -- it leads off, "An obscure law approved by Republican-controlled Congress a decade ago has made the Bush administration nervous that officials and troops involved in handling detainee matters might be accused of committing war crimes and prosecuted at some point in U.S. courts. Senior officials have responded by drafting legislation that would grant U.S. personnel involved in the terrorism fight new protections against prosecution for past violations of the War Crimes Act of 1996. That law criminalizes violations of the Geneva Conventions governing conduct in war."

Is that part of your formal proposal to the Congress in this matter, or is that going to be made part of this proposal?

ATTY GEN. GONZALES: It will be made part of the proposal. And I think here we have agreement with the JAGs, and that is, that there should be certainty. If you're talking about prosecution for war crimes, there should be certainty, and the legislation should include a specific list of offenses so everyone knows what kinds of actions would in fact result in prosecution under the War Crimes Act.

SEN. DAYTON: Would. But you're -- as I understand this, if this article's correct, you're talking about a retroactive immunity provided for prior possible violations committed --

ATTY GEN. GONZALES: Senator, that is certainly something that is being considered. Again -- and that's not inconsistent with what is already in the Detainee Treatment Act when it talks about providing a good faith defense for those who've relied upon orders or opinions. And it seems to us that it is appropriate for Congress to consider whether or not to provide additional protections for those who've relied in good faith upon decisions made by their superiors, and that's something, obviously, that I think the Congress should consider.

SEN. DAYTON: My time's expired.

Thank you, Mr. Chairman.

SEN. WARNER: Thank you very much.

Senator McCain.

SEN. JOHN MCCAIN (R-AR): Thank you, Mr. Chairman. I want to thank the witnesses for being here, and I want to thank them for literally thousands of hours of work that's been done by them and their staffs in trying to fix the problems that exist and comply with the Supreme Court decision. And I appreciate very much their efforts.

Secretary England, it was eight months ago that we passed the law requiring for interrogation techniques to be included in the Army Field Manual. It's time we got that done, Mr. Secretary. I know we have come close on several occasions. It's not right to not comply with the law for eight months, which specifically says that interrogation techniques have got to be included in the Army Field Manual. And second of all, it's a disservice to the men and women in the field who are trying to do the job. I mean, they should have specific instructions, and it was the judgment of Congress and signed by the president that we should do that.

Now, I hope that I can -- and we have been working with you, and I hope that you will be able to accomplish this sooner, rather than later. Can we anticipate that?

MR. ENGLAND: Yes, you can, Senator. I mean, in the meantime, we have gone back to the prior field manual, so, I mean, we are definitely in compliance today with that field manual. But we did want to expand. I mean, you're absolutely right. We do need to do that, and we will work to bring that to a conclusion. And we'll work with you, sir.

SEN. MCCAIN: Thank you. I hope we can do that as soon as possible. Eight months, I think, is a sufficient period of time.

Mr. Attorney General, I have -- respectfully disagree with your testimony where you say we don't train specifically and separately to Common Article 3, and the United States has never before applied Common Article 3. I was present at that hearing, and the question that was asked of the JAGs -- and I'd like to point out again, for the record, the reason why we rely on the JAGs is because they're the military individuals, in uniform, who have been practicing the UCMJ and these laws, and they're the -- will be the ones that are going to be required to carry out whatever legislation we pass.

So we obviously -- and we admit they're not all perfect. We have Senator Graham on this committee to prove that. (Laughter.)

But the fact is, we do rely on them to a great degree.

And Mr. Attorney General, the JAGs were asked about Common Article 3, and I quote Admiral McPherson. He said, "It created no new requirements for us." He said, "We have been training to and operating under that standard for a long, long time." And General Romig said, "We train to it. We always have. I'm just glad to see that we're taking credit for what we do now." And I have had conversations where they say they are training to Common Article 3.

So I hope you will engage them in some dialogue, so we can clear up your statement here.

Please respond, sir.

ATTY GEN. GONZALES: Sir, I may be mistaken, but whether or not you're -- I am mistaken about the previous testimony, I do know that they believe -- at least --

SEN. MCCAIN: Okay.

ATTY GEN. GONZALES: -- at least from them telling me -- is they believe we need clarification about what our obligations are under Common Article 3. They may be training to Common Article 3, but they believe -- they -- that it would be wise to have additional clarification about what that means.

SEN. MCCAIN: Okay. I don't want to parse with you, but here's the -- here's a quote from the hearing.

"General Black, do you believe that Deputy Secretary England did the right thing, in light of the Supreme Court decision, in issuing a directive -- DOD to adhere to Common Article 3? And in so doing, does that impair our ability to wage the war on terror?"

General Black -- "I do agree with reinforcing the message that Common Article 3 is the baseline standard. And I would say that at least in the United States Army, and I'm confident in the other services, we've been training to that standard and living to that standard since the beginning of our Army and will continue to do so."

Admiral McPherson created no new requirements for us. As General Black has said, we've been trained to an operating -- well, pretty specific about it. And I've had conversations with him. So we may have a difference of opinion, but I'm sure we can get through it.

ATTY GEN. GONZALES: I think what's important, again, is I think there is -- perhaps I'm mistaken, and I will admit to that. But, again, the important point, I believe, is that, nonetheless, they believe we need clarification as to what Common Article 3 requires.

SEN. MCCAIN: Thank you. A draft of the proposal that we've been all referring to -- it's on various web sites, et cetera -- indicates that statements obtained by the use of torture, as defined in Title 18, would not be admissible in a military commission trial of an accused terrorist.

Mr. Attorney General, do you believe that statements obtained through illegal, inhumane treatment should be admissible?

ATTY GEN. GONZALES: Senator -- well, again, I'll say this. The concern that I would have about such a prohibition is what does it mean? How do you define it? And so I think if we could all reach agreement about the definition of cruel and inhumane and degrading treatment, then perhaps I could give you an answer.

I could foresee a situation where, depending on the situation, I would say no, it should not be admitted. But depending on your definition of something that's degrading, such as insults or something like that, I would say that information should still come in.

SEN. MCCAIN: Well, I think that if you practice illegal, inhumane treatment and allow that to be admissible in court, that would be a radical departure from any practice that this nation --

ATTY GEN. GONZALES: Sir, I don't believe that we're currently contemplating that occurring. I don't believe that would be part of what the administration is considering.

SEN. WARNER: Go ahead, John.

SEN. MCCAIN: I might add that the JAGs this morning testified before the Judiciary Committee that coerced testimony should not be admissible. How do you feel about that?

ATTY GEN. GONZALES: Sir, again, our current thinking about it is that coerced testimony would not come in if it was unreliable and not probative. Again, this would be a judgment made by the military judge, again, certified military judge, and it would be quite consistent with what we already do with respect to combatant status review tribunals. And this was reflected in the Detainee Treatment Act that evidence that was coerced could be considered and is being considered so long as it's reliable and probative.

SEN. MCCAIN: I assume that the Department of Justice has produced their analysis of the interrogation techniques permitted under the Detainee Treatment Act. Is that true?

ATTY GEN. GONZALES: We have provided legal advice, yes, sir.

SEN. MCCAIN: So -- but in your statement you want Congress to do that?

ATTY GEN. GONZALES: I'm sorry, Senator.

SEN. MCCAIN: In your statement, "Congress can help by defining our obligations under Section 1 of Common Article 3."

ATTY GEN. GONZALES: Clearly, sir, I think it would be extremely helpful to have Congress, with the president, define what our obligations are under Common Article 3. It is quite customary for the United States Congress, through implementing legislation, to provide clarity to terms that are inherently vague in a treaty. And so this would be another example. I think that makes sense.

SEN. MCCAIN: All right, on this issue of inhumane treatment, I think we're going to have to -- my time has long ago expired -- have an extended discussion about that aspect of this issue, Mr. Attorney General. And I want to thank both you and Secretary England for the hard work you've done on this issue.

I thank you, Mr. Chairman.

SEN. WARNER: (Off mike.)

SEN. MCCAIN: Well, I did mention to Secretary England I hoped that we could get the field manual done, since it's been eight months since we passed the law.

MR. ENGLAND: Mr. Chairman, I responded affirmatively.

SEN. WARNER: Good. I just wanted to make the record reflect that.

MR. ENGLAND: Yes, sir.

SEN. WARNER: Senator Clinton.

SEN. CLINTON: Thank you, Mr. Chairman.

And welcome, General Gonzales, Secretary England.

Secretary England, I appreciate very much your being here, because I think it is important, and I assume you agree, to have our civilian leadership testify before this committee.

MR. ENGLAND: Yes, I do.

SEN. CLINTON: Secretary England, I'm not sure you're aware, but the leadership of this committee, Chairman Warner, formally invited Secretary Rumsfeld to appear before us in an open hearing tomorrow, alongside General Pace and General Abizaid, because of the pressing importance of the issues to be discussed; namely, Iraq, Afghanistan, the Middle East, our country's policies affecting each of those areas.

Unfortunately, Secretary Rumsfeld has declined to do so. He has instead opted to appear only in private settings. I understand yesterday he appeared behind closed doors with the Republican senators. I'm told tomorrow he will be appearing again behind closed doors with all senators.

But I'm concerned, Mr. Secretary, because I think that this committee and the American public deserve to hear from the secretary of Defense. We're going to be out in our states for the recess. Obviously these matters are much on the minds of our constituents. And I would appreciate your conveying the concern that I and certainly the leadership, which

invited the secretary to be here, have with his inability to schedule an appearance before this committee to discuss the most important issues facing our country.

I appreciate your agreement that it is important to have our civilian leadership appear, and obviously we will look forward to having our military leadership tomorrow. But I think it's hard to understand why the secretary would not appear in public before this committee, answer our questions, answer the questions that are on the minds of our constituents.

SEN. WARNER: If you would yield, Senator, on my time, not to take away from yours. You're accurate. Senator Levin and I did, as we customarily do, wrote the secretary, as well as the chairman of the Joint Chiefs and General Abizaid. The secretary made a special effort to get General Abizaid over here such that he could appear before the committee.

It was the intention of myself as chairman that tomorrow's very important hearing focus on the military operations being conducted in Iraq and Afghanistan and the impact of other military operations by other countries in the theater of Israel, Lebanon and Palestine.

I discussed with the secretary and at no time did he refuse to come up here. I simply had to coordinate this with the leadership of the Senate, most importantly my leader, and he felt it would be desirable for the whole Senate to have a panel, consisting of the secretaries of State, Defense, chairman of the Joint Chiefs and General Abizaid. And, given that option, the decision was made that we would do that one as opposed to both, given the secretary's schedule. So I did not detract that from your time.

SEN. CLINTON: Well, Mr. Chairman, I appreciate the explanation. I think it is abundantly clear, however, to the members of this committee, as it is to countless Americans, that the secretary has been a very involved manager in the military decision-making that has gone on in the last five years. And, in fact, in recent publications, there's quite a great deal of detail as to the secretary's decision- making; one might even say interference, second-guessing, overruling the military leadership of our country.

And I, for one, am deeply disturbed at the failures, the constant, consistent failures of strategy with respect to Iraq, Afghanistan and elsewhere. And I don't think that those failures can be appropriately attributed to our military leadership.

So although the secretary finds time to address the Republican senators, although he finds time to address us behind closed doors, I think the American people deserve to see the principal decision-maker when it comes to these matters that are putting our young men and women at risk. More than 2,500 of them have lost their lives. And this secretary of Defense, I think, owes the American people more than he is providing.

So I appreciate the invitation that you extended, as is your wont. You've worked very hard, I know, to create the environment in which we would have the opportunity to question the secretary. Unfortunately, he chose only to make himself available to us behind closed doors, out of view of the public, the press, our constituents, our military and their families. And I think that is unfortunate.

SEN. WARNER: I would only add that we have under consideration a press conference following his appearance before the senators tomorrow. And further, we have under discussion, as soon as the Senate returns in September, an overall hearing on many of the issues which the distinguished senator from New York raises.

SEN. CLINTON: I thank you, Mr. Chairman.

SEN. WARNER: Thank you very much.

SEN. CLINTON: Attorney General Gonzales, I want to follow up on the line of questioning from Senator McCain, because I'm frankly confused. You testified with respect to Common Article 3, and I think we have clarified that perhaps your statement was not fully understood, because you stated the U.S. military had never before been in a conflict in which it applied Common Article 3 as the governing detention standard.

You acknowledge, however, that we have frequently applied the higher standard of the Geneva Conventions to regular and lawful combatants who are captured as prisoners of war. And, in fact, you agree with the JAGS who appeared before us that that is the standard that our military trains to.

Now, why not then apply the higher standard? Why go seeking another standard? Apply the standard to which we are already training our troops rather than trying to come up with a different, perhaps lower standard, that would provide for less protective treatment of detainees?

ATTY GEN. GONZALES: Senator, that is certainly a policy decision that one could adopt. The court, however, did not say that all of the protections of Geneva apply to our conflict with al Qaeda. The court simply said that Common Article 3 applies to our conflict with al Qaeda.

And that's the problem or issue or challenge that's been created as a result of the Hamdan decision. And that's what we're trying to do in this legislation is trying to address that particular issue that's been created as a result of that decision.

SEN. CLINTON: Do you anticipate the legislation will include United States citizens as enemy combatants?

ATTY GEN. GONZALES: No, ma'am. First of all, with respect to procedures under Military Commission Order 1, there was never any question that it would not apply to trials of American citizens. And I can say with confidence that there is agreement within the administration that the commission procedures that we would have Congress consider would not relate to American citizens.

SEN. CLINTON: Now, I know that we keep coming back to this distinction that seems to be at the heart of the disagreement over the treatment of these people, whatever we call them. And some in the administration, as I understand it, have argued that there should be a distinction between unlawful enemy combatants, those who act in violation of the laws and customs of war, and so-called lawful enemy combatants, who might be, for example, full members of the regular armed forces of a state party.

How do those categories, the lawful enemy combatants, differ from what is commonly known as prisoners of war? Is there a difference between a lawful enemy combatant and a prisoner of war?

ATTY GEN. GONZALES: Yes, Senator, there is a difference. I think if you're a prisoner of war, you get the protections under the Geneva Conventions that we normally think of with respect to the Geneva Convention. And our soldiers are entitled to those protections because they fight according to the laws of war. They carry weapons openly. They wear a uniform. They operate under a command structure. And so they would be entitled to all of the protections under the Geneva Convention.

But the Geneva Convention is a treaty between state parties. And, for example, the president made a determination that in our conflict with al Qaeda, the requirements of the Geneva Conventions would not apply because al Qaeda is not a signatory party to the Geneva Convention, and therefore they would not be entitled to all of the protections of the Geneva Convention.

However, the president made a decision that nonetheless they would be treated humanely, consistent with the principles of the Geneva Convention.

The president also made a determination that with respect to the Taliban, they were -- Afghanistan was a signatory to the Geneva Convention. However, because they did not fight according to the requirements of the Geneva Convention, that they would not -- they too would not be afforded the protections of prisoners of war under the Geneva Convention.

SEN. CLINTON: Well, then, just to finish, you would then make the argument that during the Vietnam War, we would have treated a North Vietnamese prisoner different from a Vietcong prisoner?

ATTY GEN. GONZALES: I probably don't know what -- I'd hesitate to answer that question. It's conceivable given their status. My recollection about the governing or ruling government in that country makes it difficult for me to answer that question. But it's conceivable, yes, ma'am.

SEN. CLINTON: Thank you.

SEN. WARNER: I'd like to invite Senator McCain to --

SEN. MCCAIN: We didn't -- we didn't treat them differently.

SEN. WARNER: Thank you, Senator.

Senator Lindsey Graham.

SEN. LINDSEY GRAHAM (R-SC): Thank you, Mr. Chairman.

This is a very interesting area of the law, and I think it's important we go over it because I was the one asking the questions of the JAGs of what you're trained to. And I'll try the best I can, and please the legal people here that know this better than I do, just chime in if I get it wrong.

But what we train our folks to do is when they capture someone on the battlefield, that they don't become a military lawyer; they're just a soldier. And what we tell everybody in uniform, that if you capture somebody, apply POW Geneva Convention standards to the captive. Is that correct?

MR./ATTY : Yes, sir.

SEN. GRAHAM: That is higher than Common Article 3. Part of the POW Geneva Convention standards that Senator McCain probably knows better than anyone else is a reporting requirement. If you're a lawful combatant -- and Mr. Attorney General, I think I disagree with your answer to Senator Clinton -- a lawful combatant is a POW. And one of the things that we've tried to ensure in the Geneva Conventions is, as soon as someone is captured, the host country has an obligation to inform the international community that that prisoner has been captured and their whereabouts and their physical condition.

I don't know how Senator McCain's family found out about him being captured, but everybody in his situation, the North Vietnamese, not exactly the best people to use as a model here when it comes to Geneva Convention compliance. But eventually, we were informed about who was in their capture.

The problem we have as a nation, if you capture Sheikh Mohammed, do we want to tell the world within 48 hours we have him? I would argue that we would not because it might compromise our war operations. And I think what the JAGs were telling us is that from the soldier's point of view, don't confuse them. Saddam Hussein was treated as a POW. If we caught bin Laden tomorrow, if a Marine unit ran into bin Laden tomorrow, my advice to them would treat him as a POW.

However, I do not believe that bin Laden deserves the status of POW under Convention Article 3. Common Article 3 applies to all four sections of the Geneva Convention, and Common Article 3 says this is the minimum standard we'll apply to a person in your capture regardless of their status.

So I would argue, Mr. Chairman, that there is a significant distinction between a lawful combatant and an unlawful combatant, and our law needs to reflect that for national security purposes.

But I'd also like to associate myself with Senator McCain. How we treat people is about us. Even if you're an enemy combatant, unlawful, irregular enemy combatant, I think the McCain amendment is the standard in which we should adhere to, because it is about us, not them.

The problem we have is not the soldier on the front line who captures bin Laden, it's that when you turn him over to the CIA or military intelligence, the question becomes then, are the interrogations of unlawful enemy combatants bound or bordered by Common Article 3? And I would argue, colleagues, that there is not one country in this world that conducts terrorist interrogations using Common Article 3 standards, because that means you can't even say hello to them, hardly.

The purpose of this endeavor is to get military commissions right with Hamdan and right with who we are as a nation. So I'm going to be on the opposite side of you on classified information. Reciprocity is the key guiding light for me. Do not do something in this committee that you would not want to happen to our troops. The question becomes, for me, if an American servicemember is being tried in a foreign land, would we want to have that trial conducted in a fashion that the jury would receive information about the accused's guilt not shared with the accused, and that person be subject to penalty of death? I have a hard time with that.

Telling the lawyer doesn't cut it with me either, because I think most lawyers feel an ethical obligation to have information shared with their client. And I would ask you to look very closely at the dynamic of whether or not you can tell a lawyer something and the lawyer can't tell the client, when their liberty interest is at stake. I think you're putting the defense lawyers in a very bad spot.

So the question may become for our nation, if the only way we can try this terrorist is disclose classified information and we can't share it with the accused, I would argue don't do the trial. Just keep him. Because it could come back to haunt us.

And I have been in hundreds of military trials. And I can assure you the situation where that's the only evidence to prosecute somebody is one in a million. And we need not define ourselves by the one in a million.

Now, when it comes to hearsay, there are 27, I think, exceptions to the military hearsay rule. I'm willing to give you more. The International Criminal Court does not have a hearsay rule, so the international standard is far different than the standard we have in federal rules of evidence and military rules of evidence. But I think it would do us well as the country, serve us well as the country to set down and come up with a hearsay rule that has exceptions for the needs of the war on terror, not just ignore the hearsay rule in general.

So I haven't asked one question yet. I made a lot of speeches. And I'm sorry to take the committee's time up.

I would end on this thought.

SEN. WARNER: Well, we'll give you a little extra time to ask one question.

SEN. GRAHAM: Well, this is very complicated. It means a lot to all of us. And we got a chance to start over.

And Mr. Attorney General, Secretary England, I appreciate what you've done with Mr. Bradbury and others. I'm very pleased with the collaborative process. And here's where I think we've come to include. The political rhetoric is now being replaced by sensible discussions.

Mr. Attorney General, do you believe it is wise for this country to simply reauthorize Military Commission Order 1 without change?

ATTY GEN. GONZALES: I think the product we're considering now is better.

SEN. GRAHAM: So the testimony that was given to the House by a member of the Department of Justice -- that it sounds good to me just to reauthorize Military Order 1 -- would probably not be the best course of conduct?

ATTY GEN. GONZALES: I think -- again, I think what we are considering now is a better product.

SEN. GRAHAM: Do you agree with the evolving thought that the best way to approach a military commission model is start with the UCMJ as your baseline?

ATTY GEN. GONZALES: That's what we have done.

SEN. GRAHAM: Okay. I think we're making great steps forward. I really, really do.

And I couldn't agree with you more that when it comes to Title 18 -- now, the committee needs to really understand this. If you're in charge of a detainee and you're a military member, two things govern your conduct, Title 18 and the UCMJ, I think it's Article 93. It is a crime in the military to slap a detainee. A simple assault can be prosecuted under the UCMJ through Article 15, non-judicial punishment or a court-martial of a variety of degrees.

What we don't want to happen, I think, is to water down the word "war crime." We need to specify in Title 18 what is in bounds and what is not, because our people in charge of these detainees could be prosecuted for felony offenses.

And, Mr. Attorney General, I think you're correct in wanting to give more specificity -- be more specific instead of just using Common Article 3. And I'd like to work with you to do that.

The last thing is inherent authority. I had a discussion with you several months ago and I asked you a question in Judiciary Committee: Do you believe that the Congress has authority, under our ability to regulate the land and sea and naval forces and air forces, to pass a law telling a military member you cannot physically abuse a detainee? The McCain Amendment. Do we have the authority to do that?

ATTY GEN. GONZALES: I think you do have the authority to pass regulations regarding the treatment of detainees, yes sir, I do.

SEN. GRAHAM: We're making tremendous progress. Thank you.

SEN. WARNER: Thank you very much.

I see no colleagues on this side who have not had the opportunity to speak, so I now turn to Senator Collins.

SEN. SUSAN COLLINS (R-ME): Thank you, Mr. Chairman.

Secretary England, I'm trying to reconcile your actions in response to the court's decision with the testimony of the attorney general today. In response to the court's decision, on July 3rd you issued an official memorandum which applied all aspects of Common Article 3 to detainees.

Is that correct?

SEC. ENGLAND: That's correct.

SEN. COLLINS: And I applaud you for doing that and taking action quickly to comply with the Supreme Court's decision.

Now, Mr. Attorney General, in your testimony today, you say that some of the terms in Common Article 3 are too vague. You, for example, cite "humiliating and degrading treatment," "outrages upon personal dignity." If it's too vague, how is it that Secretary England is able to apply those same standards to the treatment of detainees?

ATTY GEN. GONZALES: Well, I think that even though the secretary's actions were the correct actions, even the JAGs believe that because now we're talking about prosecution for commission of a felony, there does need to be absolute certainty -- or as much certainty as we can get in defining what it is -- what would constitute a violation of Common Article 3. It's one thing to engage in conduct that may violate the UCMJ, it's another thing if that same conduct all of a sudden becomes a felony offense in which the Department of Justice is now involved in. And I think we all agree, there's universal agreement that if there's uncertainty, if there's risk, we need to try to eliminate that uncertainty, we need to try to eliminate that risk.

I think that there are certain actions that we all agree would violate Common Article 3: murder, rape, maiming, mutilation. No question about it.

But there are some foreign decisions that provide a source of concern. And the Supreme Court has said, in interpreting our obligations under the treaty, we are to give respectful consideration to the interpretation by courts overseas, and also to give weighty -- to give respectful consideration to the adaptation or the interpretation by other state parties to those words.

And so, what we're trying to do here, again, working with the JAGs, is trying to provide as much certainty as we can so that people are not prosecuted by the Department of Justice for actions that they didn't realize constituted a war crime.

SEN. COLLINS: Secretary England?

MR. ENGLAND: Senator, this has been a significant issue for the Department of Defense. As a matter of fact, it was part of the discussion of the field manual in eight months, and part of that's all part of this discussion in terms of trying to define these terms. And now it is very important, because while we have complied in the past and trained to it, it is now a matter of law. And as a matter of law, there's consequences, because --

(To Att'y Gen. Gonzales) Is it the War Crimes Act, Mr. Attorney General?

ATTY GEN. GONZALES: Right.

MR. ENGLAND: The War Crimes Act now makes U.S. personnel -- they can be prosecuted if they don't comply with Common Article 3. So those words now become very, very important. So, degrading treatment, humiliating treatment, that's culturally sensitive terms. I mean, what is degrading in one society may not be degrading in another, or it may be degrading in one religion, not in another religion. So -- and since it does have an international interpretation, which is generally frankly different than our own, it becomes very, very relevant. So, it's vitally important to the Department of Defense that we have legislation now and clarify this matter, because now that it is, indeed, a matter of law, it has legal consequences for our men and women and civilians who serve the United States government.

SEN. COLLINS: Mr. Attorney General, I want to follow up on a comment that Senator Graham made in his questioning of you. He pointed out the dilemma of giving access to classified information to a detainee who's being brought to trial. And he says what happens now is that if it were an American citizen who is a member of the armed forces and you needed to protect that information, then the trial doesn't go forward. And Senator Graham suggested that in this case the result is that the detainee is not tried but simply held. But I wonder if you're troubled by that outcome. It seems to me if the result is that the detainee is held without trial for a non-ending amount of time, that that raises real concerns as well. And I wonder if that's a fair outcome --

ATTY GEN. GONZALES: Well, I -- I don't know --

SEN. COLLINS: -- that results in him not having access to classified information if he doesn't get his time in court, and -- but he's held. I mean, that's punishment --

ATTY GEN. GONZALES: I don't know -- I don't know whether or not I can comment on whether or not it's a fair result. I do know that at the end of the day I don't think the United States -- this administration, I don't Department of Defense and Deputy Secretary England can comment on this -- want to remain the world's jailers indefinitely.

Obviously, we hold people because we are engaged in a conflict with al Qaeda and there's a military necessity to hold people. I think generally, the American people would like to see some kind of disposition sooner as opposed to later. They don't want these people released, but if in fact they can be prosecuted for committing crimes against America, I think the American people would like to see that happen. And so it may make sense to at least have that opportunity available. That's the whole reason we want to have military commissions.

Obviously, there's a great deal of political pressure on this administration to close Guantanamo. Well, we have to do something with the folks at Guantanamo. We can return them back to their home countries. Sometimes that's difficult to accomplish. We can release them, but we can only release them if we're confident they're not going to come back and fight against America. And we already know that there have been some instances where that has happened. And so that's a decision that is one that is very weighty and we have to exercise with a great deal of care.

And so another alternative is to try to bring them to justice through military commissions. And again, I think it would -- it's going to be an extraordinary case when we will absolutely need to have classified information to go forward with the prosecution that we cannot share with the accused. But I think it's something that we really ought to seriously consider to have remaining as an option.

And to get back to one final point for Senator Graham, we contemplate a provision in the legislation which would make it quite clear that the provisions of the military -- procedures of the military commissions would not be available -- could not be used against anyone that the president or the secretary of Defense determined was a protected person under Geneva, or a prisoner of war, or qualify for prisoner of war status under Geneva. And therefore, if another country captured an American soldier and they said, "Okay, we're going to use your military commission procedures that you passed on this American soldier," well, according to the very terms of the military commission procedures that we're contemplating, they could not do that.

SEN. COLLINS: Thank you.

SEN. GRAHAM: Could I -- Mr. Chairman?

SEN. MCCAIN: Senator Nelson.

(To Senator Graham) Did you want --

SEN. GRAHAM: I just wanted to respond to that comment, but I'll -- I'll defer.

SEN. MCCAIN: Do you mind, Senator Nelson?

SEN. BENJAMIN NELSON (D-NE): I don't mind.

SEN. GRAHAM: I guess what I was trying to say, only 10 percent or less, I believe, of the enemy combatants have been scheduled for military commission trial. Is that correct?

ATTY GEN. GONZALES: To date. But there's a reason for that, Senator.

SEN. GRAHAM: Well, I think there's a good reason. Every enemy combatant's not a war criminal. And I don't want us to get in a situation where every POW is a criminal. If you're fighting lawfully and you get captured, you're entitled to being treated under Geneva Convention. Every enemy combatant is not a war criminal. So we don't want to get in the dilemma that you got to prosecute them and let them go, because that's not a choice that the law requires you to make.

But once you decide to prosecute somebody, the only point I'm making, Mr. Attorney General, when you set that military commission up, it becomes a model, it becomes a standard. And the question I have is that we have some Special Forces people who are not in uniform that may fall outside the convention, that may be relying on Common Article

3. That may be the only thing left to them in foreign hands. So what we do with irregular enemy combatants could affect the outcome of our troops who are in the Special Forces field. And that's what we need to think about.

SEN. MCCAIN: Senator Nelson.

SEN. BENJAMIN NELSON: Thank you, Mr. Chairman. And I want to thank the witnesses as well for being here today to help us understand this effort to come into compliance with the Supreme Court decision and the importance of doing it in a lawful way in handling enemy combatants.

Now, if my colleague from South Carolina is right that not every enemy combatant is a war criminal, and not every enemy combatant has to be tried, is it your opinion, Mr. Attorney General, that someone could be held for the duration, even though not tried, however long the duration is, even in a war against terror, as opposed to a more traditional war that typically has a beginning and, to date, has always had some sort of an ending?

ATTY GEN. GONZALES: Senator, not only is that my opinion; that is a principle that has been acknowledged by the Supreme Court.

SEN. NELSON: And so the only purpose of trying to have commissions, in effect, is to try people who are enemy combatants as an example, who we believe have committed war crimes; that we want to bring war crime prosecution against them and hold them as war criminals? Is that correct?

ATTY GEN. GONZALES: Yeah, I -- it's an additional tool that I believe is necessary and appropriate for a commander in chief during a time of war. Yes, sir.

SEN. NELSON: Okay.

Mr. Secretary, does your memo on Common Article 3 extend to contractors who are performing interrogations, as opposed to just simply members of the military who might perform interrogations of enemy combatants or people who are suspected of being enemy combatants? In other -- outside contractors --

MR. ENGLAND: Yeah --

SEN. NELSON: -- non-uniformed individuals -- do they fall under Common Article 3 as well?

MR. ENGLAND: Senator, I will have to get back with you. I mean, frankly, at the time I put out the memo, I wasn't thinking of contractors. I was thinking people in the Department of Defense. So --

SEN. NELSON: And there wouldn't be any question about a translator, for example, but there could be a question about contractors, because wasn't that one of the questions in Abu Ghraib and other circumstances where there were others performing interrogations?

MR. ENGLAND: So, Senator, I will need to get back with that.

SEN. NELSON: Okay. And then if we turn over any detainees to other governments -- let's say Pakistan or Afghanistan -- are they subject to Common Article 3, for their protection?

ATTY GEN. GONZALES: Well, sir, we have an obligation not to turn them over to a country where we believe they're going to be tortured. And we seek assurances, whenever we transfer someone, that in fact that they will not be tortured.

SEN. NELSON: So are we fairly clear or crystal-clear that in cases of rendition, that hasn't happened?

ATTY GEN. GONZALES: Well, of course, Senator, rendition is something that is not unique to this conflict --

SEN. NELSON: Oh, no, I know.

ATTY GEN. GONZALES: -- not to -- (inaudible) -- this administration or this country.

SEN. NELSON: No, no, I'm not trying to suggest that. I'm just trying to get clear --

ATTY GEN. GONZALES: I cannot -- you know, we are not there -- (chuckles) -- in the jail cell in foreign countries where we render someone. But I do know we do take steps to ensure that we are meeting our legal obligation under the Convention against Torture and that we don't render someone to a country where we believe they're going to be tortured.

SEN. NELSON: So we would want to see Common Article 3 applied in every situation where we may turn a detainee over to another country. We would take every action we could be expected to take to see that they -- that that was complied with, or is that expecting more than we can commit to?

ATTY GEN. GONZALES: Well, sir -- I mean, the Supreme Court made no distinction in terms of military contractors or military soldiers. The determination was that Common Article 3 applies to our conflict with al Qaeda.

SEN. NELSON: Thank you, Mr. Chairman. Thank you for your answers.

SEN. WARNER: Thank you, Senator Nelson.

We now have -- the next one is Senator Cornyn.

SEN. JOHN CORNYN (R-TX): Thank you, Mr. Chairman.

Secretary England, General Gonzales, welcome, and thank you for being here today. And let me congratulate the Department of Justice, Department of Defense on the diligence with which you've undertaken this challenge to try to address the concerns and the decision of the Supreme Court in the Hamdan case.

My questions don't have so much to do with the nature of the trial, because, to me, that seems like that's the easiest part of this to deal with. In courtrooms and cities and all across this nation, we have trials going on, civil and criminal trials; we have court-martial proceedings. We kind of understand sort of the basic parameters of what a fair proceeding looks like, and the Supreme Court seemed to say -- or more than just seemed to say -- that it was appropriate that the general rules that would apply to a fair trial could be adjusted and adapted as appropriate to the nature of the military commission and the exigencies of trying individuals, unlawful combatants during a time of war.

But I think that based on what Senator Graham sort of questions that he asked and the answers that you gave, I don't think that's that hard, and I think what the work that you -- that the administration has done, the proposals that have been discussed, we can do that.

What concerns me the most is, when I look at the nature of the intelligence that's been obtained through interrogation of detainees at Guantanamo, it includes the organizational structure of al Qaeda and other terrorist groups; the extent of terrorist presence in Europe, the United States and the Middle East; al Qaeda's pursuit of weapons of mass destruction; methods of recruitment and locations of recruitment centers; terrorist skill sets, including general and specialized operative training; and how legitimate financial activities can be used to hide terrorist operations. Those are the sorts of things that have been gleaned through interrogation of unlawful combatants at Guantanamo Bay.

And if you agree with me -- and I'm sure you do -- that we ought to use every lawful means to obtain actionable intelligence that will allow us to win and defeat the terrorists, the question I have for you is, why in the world -- and not just you -- the question I would ask rhetorically is, why would we erect impediments to our ability to gain actionable intelligence over and above what is necessary to comply with the Supreme Court's decision in Hamdan?

And while we've heard a lot of testimony during the course of these hearings about the nature of the proceeding that's required by the Supreme Court decision, what we haven't heard enough about, in my view, is what concerns that we should have about erecting additional impediments maybe not required by the Supreme Court decision but, if we're not careful, raising new barriers to our ability to get actionable intelligence.

And I'd like to ask Secretary England if he would address that, and then Attorney General Gonzales.

MR. ENGLAND: Senator Cornyn, I'm listening, but I'm not aware of these additional barriers that we're constructing.

SEN. CORNYN: Well, let me try to be clear. There's been some suggestion -- and I think -- that the Geneva -- the Supreme Court held that the Geneva Conventions broadly speaking apply to al Qaeda. Senator Graham said, and in previous testimony I believe Attorney General Gonzales has addressed his belief that that is not true; even though Common Article 3 would apply, that Geneva Convention broadly speaking does not apply to confer POW status on al Qaeda.

And what I'm speaking about particularly is Article 17 of the Third Geneva Convention says that prisoners of war who refuse to answer may not be threatened, insulted or exposed to unpleasant or disadvantageous treatment of any kind.

And what I'm concerned about is, if we somehow through an act of Congress in effect hold that unlawful combatants like al Qaeda are entitled to protections such as Article 17 of the Geneva Convention, what that would do to our ability to gather intelligence if they could not be exposed to unpleasant or disadvantageous treatment.

I hope that helps clarify.

MR. ENGLAND: I guess my understanding is, is the legislation deals specifically with Common Article 3. That is, it does not elevate to full POW status, so it deals with basically the law that was addressed in Hamdan; that is, that Common Article 3 applies, and that is what the nature of this legislation is. So I'll let the attorney general expand, but I believe that we have limited this legislation specifically to Common Article 3 and the application of Common Article 3 to military commissions.

SEN. CORNYN (?): That's my understanding as well.

ATTY GEN. GONZALES: Senator, you raise a very important point. We are engaged in an ongoing conflict. A lot of people refer to procedures and proceedings of other tribunals that occurred after the conflict was over, when there was a lot less concern about access to classified information and sharing of information.

Clearly, in this kind of conflict, the gathering of information, of intelligence is critical. It is so important. It is one reason why we suggest that we not use or have Article 31 of the UCMJ as part of the procedures for military commissions, which requires Miranda rights as soon as somebody's under suspicion of having committed some kind of crime. That makes no sense when you're on the battlefield and you want to -- you want to grab someone. You know that already they're a suspect, but you need more information. It's important to be able to question them. And the notion that you'd have to read them their rights and give them lawyers at the outset, of course, makes no sense.

But more to your point about the application of Geneva. Clearly, I think that there are consequences that follow from a decision that al Qaeda should be afforded all the protections under Geneva. It will affect our ability to gather information. There's no question about that. Clearly, the requirements of Common Article 3 place some limits, but they're limits very consistent with what the president has already placed upon the military since February of 2002. And we believe that we can continue to wage this war effectively under Common Article 3, assuming that Congress provides some clarity about what those obligations are, because there are some words that are inherently subject to interpretation. And I think it makes sense, once again, to have Congress provide clarity about what our obligations are under Common Article 3.

SEN. CORNYN: General Gonzales, of course, Congress has spoken on the Detainee Treatment Act, providing appropriate but limited judicial review for -- in a habeas corpus setting for these detainees. Is it your -- is it your opinion that we can, consistent with the Supreme Court decision, if we were to apply the provisions of the Detainee Treatment Act, including the McCain amendment for treatment of detainees that provide proceedings for the trial of the -- of the detainees by military commission, as you have proposed, that that would be sufficient to comply with the concerns raised by the court?

ATTY GEN. GONZALES: Well, of course, the court -- the court really took no action with respect to -- when I say "the court" -- five members of the court, a holding of the Supreme Court of the United States, there were not five members of the court that said this particular provision is unconstitutional or unlawful. What the court said, Mr. President, if you want to use procedures that are not uniform with the Uniform Code of Military Justice, you can't do that unless you -- there are practical reasons for doing so. If you -- otherwise you have to use the procedures of the Uniform Code of Military Justice, or have Congress codify what those procedures will be. And so, you know, again, the Uniform Code of Military Justice is a creature of Congress. If Congress wants to change that or use those procedures or deviate from those procedures, I think Congress has the authority to do so.

SEN. CORNYN: My last question has to do with the application of the Detainee Treatment Act to pending cases that are in the federal court system. Obviously, Congress intended the Detainee Treatment Act would provide an exclusive method of judicial review of habeas petitions emanating out of Guantanamo, but it was not expressly in the legislation applied to all pending cases. Is it your judgment and recommendation to Congress that we apply in the course of the legislation that we file here -- whatever we pass that would apply to all pending cases, including the provisions of the Detainee Treatment Act?

ATTY GEN. GONZALES: That would be the recommendation of the administration, Senator. We are currently burdened by hundreds of lawsuits for all kinds of matters relating to conditions of cells, conditions of recreation, the types of books that people can read. And so, again, we believe that the process that we had set up, the combatant status

review tribunal process, combined with the annual review boards, combined with review -- appeal up to the D.C. Circuit, we believe that these provide sufficient process to detainees. And we believe that all of this litigation should be subject to the Detainee Treatment Act.

SEN. CORNYN: Thank you very much.

Thank you, Mr. Chairman.

SEN. WARNER: (Off mike) -- colleagues will proceed after Senator Sessions to have another round.

Senator Sessions at this time.

SEN. JEFF SESSIONS (R-AL): Thank you very much.

You know, our JAGs say, well, we train to Common Article 3. But I used to train soldiers in the Army Reserve, and I had to teach them the Geneva Conventions. And what we were training to were for lawful prisoners of war. We were training to people who complied with the Geneva Conventions, were entitled to the protections of the Geneva Conventions.

Now, I just want to say, I respect the JAG officers. I held a JAG slot for a short period of time, but I never had my Charlottesville training, so I don't claim to be anything like a legitimate JAG officer. But I would just say that with regard to these unusual areas, unlawful combatants who renounce all principles of warfare, who openly behead people, who take it as their right to kill innocent men, women and children to further their agenda, this is an unusual thing for the military to deal with. And I think the president -- I'm just going to be frank. I think the president had every right to call on his counsel and the Department of Justice to ask what authorities and powers he had, and I don't believe he was constrained to follow the Uniform Code of Military Justice in handling these.

And Secretary England, would you agree with that?

MR. ENGLAND: Yes, sir, I agree with that.

SEN. SESSIONS: Mr. Attorney General, you've been in the middle of that. Wouldn't you agree with that?

ATTY GEN. GONZALES: Well, certainly, Senator, based upon our reading of precedent and previous court decisions, we believe the president did have the authority to stand up these commissions with these procedures, which provided much more process than any other commission process in history. But the Supreme Court has now spoken in Hamdan.

SEN. SESSIONS: Well, I agree. And I would just ask you, from my reading of it, it appears to me that the Supreme Court to reach the conclusion it did really had to reverse the existing authority of the U.S. Supreme Court Ex Parte Quirin.

Would you agree with that?

ATTY GEN. GONZALES: Again, Senator, there are many aspects of the opinion that I would question and that I would love to have discussed --

SEN. SESSIONS: Well, I'll just ask you this. You believed, did you not, that these procedures complied with the Supreme Court authority in Ex Parte Quirin, and you attempted to follow Supreme Court authority when you set up these commissions, did you not?

ATTY GEN. GONZALES: No question about it, Senator, that lawyers at the Department of Justice and certainly in the White House believed that the president had the authority and that these procedures would be consistent with the requirements under the Constitution.

Can I just say one thing, Senator?

SEN. SESSIONS: Yes.

ATTY GEN. GONZALES: I've heard a lot of people say, "Well, how could you be surprised, how could you guys get this wrong?" You know, these are hard issues, and we were right all the way up until June 29th, 2006. We had a D.C. Circuit opinion that said, "You're right, Mr. President."

I also would remind everyone that six of the eight justices wrote in that case -- six of the eight -- there was 177 pages worth of analysis. So for those people who say this was such an easy issue, I beg to differ. If you look -- it's easy

to criticize after the fact, but these were very, very hard issues, and assuming that Justice Roberts would have stayed with his position on the Supreme Court -- as you know, he voted on the D.C. Circuit opinion -- it would have been a 5 to 4 decision.

This is a very tough, very close issue.

SEN. SESSIONS: Well, I couldn't agree more, and I just don't think the president and the Department of Justice or Department of Defense needs to be hung out there suggesting that you're way off base. It was a 5 to 4 opinion, very complex, and even then, it was not harshly critical of the Department of Justice. It just set some standards that now we've got to figure out how to comply with.

Now, let's talk about this Uniform Code of Military Justice. This is a trial procedure and sets the standards for treatment of American soldiers who have been charged with crimes; is it not? I mean, this is a standard -- this is a manual for trying soldiers who may have committed crimes, American soldiers.

ATTY GEN. GONZALES: And an overwhelming number of those crimes, as I believe to be the case, don't relate to crimes that are committed in battle or on the battlefield.

SEN. SESSIONS: Oh, absolutely. Whether they committed assault or a theft or any of those things, are tried. And we give them in many ways more protections than an American would get tried in a federal court for a crime in the United States of America.

ATTY GEN. GONZALES: There is no question about that, that the procedures and rights that are provided to our service men are greater in many respects than you or I would receive in an Article 3 court.

SEN. SESSIONS: We just can't transfer that to the trial of the Nazi saboteurs that were described in the Ex Parte Quirin case, many of whom were tried and executed in fairly short order by President Franklin Roosevelt -- or under his direction.

Now, let's take the question of coercion. The federal law on coercion in criminal cases -- that used to be my profession. I spent more time prosecuting than I've done anything else in my professional career. It is very, very, very strong. For example, if a police officer hears an alarm going off and someone running away, and he grabs him and says, "What were you all doing and who was with you?" And the guy says, "My brother, Billy," that would be stricken as a coercive statement because he was in custody of the police officer and he didn't know he didn't have a right not to answer.

If a military officer questions a lower-ranking individual, they can -- they are protected from -- that's considered coercion because they may feel they have an obligation to answer that officer when they have a right not to give it.

I remember the Christian burial speech where the officer got the murderer to take him to the body of the little girl by saying, "She's lying out there in the snow. You ought to tell us where she is so we can get a Christian burial." Five to four, the Supreme Court said that was an involuntary confession.

All I'm saying -- and then you got the exclusionary rule. That is not required by the Constitution to the degree that we give it in the United States, or any fair system of law. Most nations do not create the exclusionary rule that says that if a soldier out on the battlefield improperly seized evidence, that that can't be utilized, or if a soldier apprehends somebody in an -- on the battlefield, and they confess to being involved in terrorism, that that would violate coercion by our standards. Surely, we're not going to make that excluded from evidence in a commission trial for a terrorist charge.

ATTY GEN. GONZALES: Clearly, Senator --

SEN. SESSIONS: You see what I'm saying?

ATTY GEN. GONZALES: Yes, sir.

SEN. SESSIONS: So I want to be sure, when you study this language and you -- y'all are going to have to take the lead on it and think all this through. But I'd like to say to you we need you to help us, because I have great confidence in the lawyer skills in the members of this committee and their commitment to doing the right thing, but we don't know all these details. We haven't studied that 170-page opinion, I hate to tell you. Some of them like to make us think we've all read it, but we haven't.

And so I guess I'm calling on you to do that. And let's be sure that these extraordinary protections that we provide to American soldiers and American civilians, because we live in such a safe nation that we can take these chances and

give these extra rights, that we don't give them to people who have no respect for our law and are committed to killing innocent men and women and children.

ATTY GEN. GONZALES: Senator, you've raised some good points. I would urge the committee to also consider that as we talk about whether or not coerced testimony should come in -- and again would remind the committee that our thinking is -- is that if it's reliable and if it's probative, as determined by a certified military judge, that it should come in -- that if you say that a coerced testimony cannot come in -- if I'm a member of al Qaeda, every one is going to claim this evidence has been coerced. And so then we'll get into, I think, a fight with respect to every prosecution as to what is in fact coerced and what is not coerced.

SEN. SESSIONS: And I guess questions of torture and things of that are what people think about when they think about coercion. But if we just adopt the UCMJ, we'll pick up all these other things that I just mentioned that I'm not -- that will often be -- will often turn on the action of an Army soldier who's never been trained like a police officer. And we have enough problems with police officers trying to do everything precisely right.

And I just -- I think you'll work on this correctly. I have good -- I have confidence in it. And I think we need to understand these things before we attempt to alter what I'm sure you'll come up with.

ATTY GEN. GONZALES: But let me be clear about this, Senator. There is agreement about this -- is that evidence derived from torture cannot be used.

SEN. SESSIONS: Yes.

Thank you, Mr. Chairman.

SEN. WARNER: Let's -- Senator Talent.

SEN. JAMES TALENT (R-MO): Thank you, Mr. Chairman.

My main concern through these hearings has been to make certain that our men and women have the ability to get the actionable intelligence that they may suspect is there.

Now, as I understand it, we already prohibited cruel and inhumane punishment.

And the issue -- let me just sum it up -- is what about degrading tactics? In other words, there may be tactics that are not cruel and inhumane but are degrading. And you've indicated you'd like us to provide guidance, and everybody here has said we want you to provide guidance.

What about if we came up with a list of what they could do? In other words, structure the -- and I'm talking about interrogations now. I'm not talking about trials afterwards, because there -- at least when you get to the trial point you've gotten the intelligence and you've acted on it from a military standpoint, so -- which is my main concern. What about if, between you all and us here in the Congress, we came up with a list for our men and women about what they could do? And they look at -- and you can play loud music. You know, you -- you can, even if the -- even if culturally the prisoner would feel degraded, you can have an all-woman interrogation team -- you know, a list of things that you could do. And then, perhaps, just say, look, if it's not on the list of things you could do, establish a process or a sign-off by somebody with some kind of oversight for other tactics that may or may not be degrading under the circumstances. If you'd answer that question, then also, if either -- maybe address if we did that, should the standard vary a little bit depending on how crucial the judgment is about the intelligence. Because I know, I -- personally I wouldn't -- I would want our people to push more into a gray area if they felt the intelligence was really crucial to saving American lives.

ATTY GEN. GONZALES: Well, of course, the idea that you propose regarding lists I think is obviously one that the -- that could be considered. The concern I always have about lists is what you forget to put on the list, but you proposed a possible solution, to provide a mechanism where additional items could be included on the list.

I, for one, am worried about different base line standards. We have already a base line standard under McCain: the McCain amendment, or DTA. And I think it may be wise to first consider whether or not that shouldn't also be the standard with respect to our obligation under Common Article 3, which ties it to a U.S. constitutional standard. It would prohibit cruel, inhumane and degrading treatment that is prohibited under the 5th, 8th and 1th Amendment.

Now, I don't know if that goes far enough, however, because you're talking about a task that is, in and of itself, still a little bit subjective. And for that reason, because we're talking about possible criminal prosecution under the War Crimes Act, I do think it makes sense, and I think the JAGs agree, that it is appropriate to have lists in the War Crimes

Act of those offenses, those activities, those actions which, if you do, you have violated the War Crimes Act and you can be prosecuted for a felony.

So that sort of is our current thinking, Senator. I'd be happy to -- we'd be happy to take back your your proposal and think about whether or not -- I mean, the benefits of it and whether or not there are other problems that I can't think of right now. But our current thinking is, is that -- is perhaps what we intend to propose to the Congress is that, guys, let's just have one standard. Everyone seems to be comfortable with the McCain standard, which is tied to a U.S. constitutional standard.

SEN. TALENT: Are you certain that that standard would pass muster under Article 3 of the Geneva Convention? My understanding is that --

ATTY GEN. GONZALES: Yeah, I am confident of that. Not only that -- again, you know, having been -- not brought to task, but highlighted by Senator McCain that my recollection of the JAGs' testimony was incorrect -- my recollection of the JAGs' testimony was that they felt comfortable that the McCain standard fits nicely, neatly within our obligation under Common Article 3. And I believe that to be true also.

SEN. TALENT: Well, I'll go back and check that too, because I thought that they believed more guidance was necessary on that point of what's degrading and what isn't. Because it certainly seems logical to me to believe that there may be interrogation tactics that are cruel and inhumane that are not degrading.

ATTY GEN. GONZALES: I think that they believed we needed additional clarification, and certainly would welcome additional clarification through the McCain Amendment as a possibility.

SEN. TALENT: Of course, one of the problems with a list is that it's telling, you know, the enemy what we're going to do or not do, so they can prepare, but of course, it seems to me we're in that boat one way or the other. So at least my concern now is that our interrogators feel comfortable enough that they don't draw back from something we would want them to do.

MR. ENGLAND: Senator, if I could make a comment here. The McCain Amendment refers to the Army Field Manual as a part of law. So earlier in this discussion, Senator McCain asked about the status of the Army Field Manual. And of course, that's what we've been dealing with these months, is trying to articulate better -- not a list per se, but to describe better for our men and women exactly what is permissible under the McCain Amendment, which, again, is grounded in the Constitution, so there's now a grounding in some of these terms that we didn't have before, and now we're trying to help interpret that for the men and women in the Army Field Manual.

And we have been working on that on some time, because you can well imagine it's complex for us to do to also reduce this to words in the field manual. But I expect that ultimately that perhaps, after we discuss this, that that, quote, "list" shows up in the Army Field Manual, not in the legislation per se.

And I guess, Attorney General, I know your views of that, but -- .

SEN. TALENT: I think I just got blue-slipped. And since I'm the last one, I'm not --

SEN. WARNER: Go right ahead and get -- (off mike).

SEN. TALENT: Well, again, I just think it's very -- the attitude of our interrogators, I think, is very important, and I don't want them to be afraid that they're going to be hung out to dry for making a fair call under difficult circumstances.

And maybe that's just, Mr. Chairman, the commitment of everybody on this end of Pennsylvania Avenue and on the other end of Pennsylvania Avenue that we're just not going to do that; you know, that we're not going to -- for whatever reason, we're not going to hang these men and women out to dry if they make a reasonable call under difficult circumstances. I don't want us to forego intelligence we should be getting because people are deterred in that way.

SEN. WARNER: I think that's a very fair statement, and I associate myself with that statement.

SEN. TALENT: Thank you, Mr. Chairman.

SEN. WARNER: Thank you.

Senator Thune.

SEN. JOHN THUNE (R-SD): Thank you, Mr. Chairman.

Mr. General, Mr. Secretary, thank you for appearing today, and thank you for providing your insights.

As has already been pointed out, these are very complex legal issues with lots of different bodies of law, from the more recently passed Detainee Treatment Act to the conventions to the UCMJ, which is why I think you had six different people writing opinions in the Supreme Court when they looked at this.

And not being a lawyer -- there are a number of lawyers on the committee, and obviously some great perspective and experience to bring to this issue. And I know we count upon you to get this right within the legal framework and the parameters that have been established for us to operate within.

As a non-lawyer, I would hope that, in looking at this issue, we can, at the end of the day, accomplish a couple of objectives what are -- that are consistent with principles that I think the people that I represent would like to see accomplished in this debate.

First and foremost, my main concern in this -- and I think it's been voiced by others here -- is that the protection of our own men and women who serve beyond our shores and the types of risks and jeopardy we put them in if we don't have our house in order here, so that colleagues like our colleague, Senator McCain, and the treatment that he endured when he was in detention for all those years, that's something we really want to avoid. And that, first and foremost, I think, has got to be a guiding principle when we look at this issue.

Secondly, that we do adopt treatment standards that reflect America's core values when it comes to respect for human rights. And I think that's something that everybody probably is in general agreement on as well.

And so those are sort of two guiding principles.

And finally, as has been noted today as well, my concern would be that we -- in doing that, that when we accomplish these things, we not do it in a way that hamstrings our ability to acquire the intelligence that is necessary for us to prosecute and succeed and win the war on terror.

And that seems to be the real issue here in coming up with the legal framework, is how best to accomplish that and yet enable the people who we're really relying on to get the information that's necessary for us to succeed in the war on terror are able to accomplish that objective.

Secretary England, just -- it seems to me, too -- and I listened to this whole discussion about lawful and unlawful combatants, and there are different sort of standards that are in the Geneva Conventions to the DTA -- but Secretary England, in your opinion, within the Geneva Convention, is the definition of unlawful combatant adequately defined to encompass terrorist groups and how detainees from those groups are to be treated and the rights that they have under the convention?

MR. ENGLAND: Well, we know they are not prisoners of war. So -- in my understanding -- and again, I'm not the lawyer on this, like yourself, Senator -- but my understanding is it does define unlawful combatant. And Common Article 3 is common across all four Geneva Conventions. So when you apply it -- I mean, I believe we do know how to apply Common Article 3 if it is properly defined.

And so, as the attorney general stated earlier, what we have wrestled with, there are particular words, and particularly the outages upon personal dignity and particularly humiliating and degrading treatment, which are very subjective.

And so that is of concern, which is one reason it's very important that we have a legal basis for Common Article 3 as we go forward, and the purpose for this legislation is hopefully to help clarify that. So I believe when we have defining legislation for Common Article 3, then we will have an adequate basis to go forward in terms of applying Common Article 3 to unlawful combatants.

ATTY GEN. GONZALES: Senator, I think part of the problem we have is in 1949, the drafters and those who signed the Geneva Conventions did not envision this kind of conflict. You know, we have a superpower like the United States taking on a terrorist group that's not really tied to a state actor.

And so some of the provisions of the Geneva Convention, I think you have to ask yourself, do they continue to make sense? And I think that's a legitimate question for the administration and for Congress. And I'm not talking about those provisions that relate to basic humane treatment. Obviously those remain relevant today and very, very important, and something that we believe in, is consistent with our values.

But some of the provisions, quite frankly, it's hard to square with the kind of enemy that we deal with today. And I know there have been discussions within the State Department. I've testified about the fact that this is an issue we have wrestled with for years in the administration about; I mean, should there be a formal evaluation of the Geneva Conventions?

I want to emphasize very quickly, having made that statement, I'm not in any way suggesting a retreat from the basic principles of Geneva in terms of the humanitarian treatment. I mean, obviously that remains eternal, and we need to continue it and we need to fight for that. But there are certain provisions that I wonder, given the times that we currently live in, and given this new enemy and this new kind of conflict, whether all the provisions continue to make sense.

SEN. THUNE: And my concern would be, with respect to the way our own men and women are treated, is for state actors and those that follow the conventions and rules of war, that we have standards that are fair and respectful of those basic human rights.

But on the other hand, at the same time, I'm somewhat sympathetic to some of the comments that Senator Sessions was making that you aren't dealing with -- I don't think the terrorist organizations could care less about what kind of -- what we do here. It doesn't mean anything to them. When they -- if they've gotten possession of some of our people, they're going to treat them the same way they treat -- we've seen them treat them on our television screens and everywhere else, and that is to kill and destroy without conscience or remorse. And I think that's a very different standard. And so that's why I'm kind of getting at this whole distinction between lawful and unlawful combatants.

ATTY GEN. GONZALES: I agree with you. I don't think al Qaeda -- I don't think their actions would change one bit depending on how we deal with people that we detain. But, quite frankly, they're not the audience that we should be concerned about.

SEN. THUNE: Right.

ATTY GEN. GONZALES: There are expectations of the United States in terms of how we treat people, and so there are basic standards of humanity that need to be respected, irrespective of how brutal the enemy is.

SEN. WARNER: Would you like another question?

SEN. THUNE: Well, if I might, just one last question.

I'd address this to Secretary England.

Has there been any concern within the department that the legislation that's being considered will actually create an incentive for combatants that the United States will face in the future to ignore the laws of war, because either way, they're going to be treated as if they were legal combatants? I'm saying that terrorist groups that might -- instead of following the conventions and rules of war, if they figure they're going to be treated as legal, lawful enemy combatants, as opposed to unlawful or terrorist organizations, I mean, is that a concern?

ATTY GEN. GONZALES: I don't think that that is a concern. I mean, we are contemplating -- again, as I indicated in response to an earlier question, a provision that makes it clear that if the president or the secretary of Defense determine you are a prisoner of war, so if you're fighting by the rules, you're not going to be covered under these proceedings. And so I would hope that that would provide an incentive, quite frankly, for people to fight according to the laws of war so that they would receive all the protections under the Geneva Convention.

SEN. THUNE: Thank you, Mr. Chairman.

SEN. WARNER: Thank you, Senator.

Gentlemen, we've had a good hearing, and I'm going to wrap up here very shortly.

But I must say, I was quite interested, Senator Thune, in the question and answer, reply, and really the colloquy that you had with our distinguished panel of witnesses. And I couldn't agree more.

I remember the year 1949 very well. (Chuckles.) I spent a -- the last year of World War II in uniform, and had come out and actually had just joined the Marine Corps in 1949.

And nobody envisioned the situation that faces the world today and particularly those nations, which I'm so proud of our nation, fighting this war on terror. And I think you're exactly right; that was never envisioned. But there is lan-

guage in that convention that I'm sure we're going to incorporate and follow because the court has spoken to it, the Supreme Court, and that's the law of the land. And you and I as lawyers respect that.

And that brings me to, as I look back over the work that we've done so far, and I look back at the UCMJ, that has a relatively small amount of statutory language and a considerable amount of codification of rules and so forth and a lot of presidential rule making.

Now, how should we approach this statute? Should Congress, given the importance of the Supreme Court decision and other things, adopt more legislative and less rule making?

ATTY GEN. GONZALES: That's a --

SEN. WARNER: If you want to reflect on that, please do so. I think it's something we should discuss further, the two of us and with other colleagues, as we go along.

ATTY GEN. GONZALES: All right, Mr. Chairman.

SEN. WARNER: So you see my point there?

ATTY GEN. GONZALES: No question about it. I mean -- and obviously, that's probably always a discussion or debate with respect to a piece of legislation and how much flexibility or discretion to give the executive branch. And obviously, when you're talking about discretion to the commander in chief in a time of war, that seems to make some sense. Some people believe that the more that Congress codifies, the more likely it is to bulletproof it from a bad decision in the courts. I think in this particular case, quite frankly, there are things that would be helpful to have codified, but there are certain areas, quite frankly, that I think leaving flexibility to the commander in chief through the secretary of Defense makes sense.

And I think our thinking on it reflects that kind of balance, where, again, it's helpful to have some clarity, but also provide some flexibility to the secretary of Defense.

SEN. WARNER: All right. At the moment, I share those views. We want to establish the four corners, and the Constitution is very clear that the president is the commander in chief. Yet there is other provision, we make the rules with regard to the men and women of the armed forces.

So somewhere in between those two constitutional provisions is our challenge.

But I'm enormously pleased with this hearing. I think we've made great progress, and I commend both of you.

And I wonder if you'd like, for purposes of the record, to have the names of those individuals who accompanied you here today and who presumably have worked hard on this included in this record.

ATTY GEN. GONZALES: Thank you, Mr. Chairman. I'm accompanied -- you well Mr. Steve Bradbury, who's the acting assistant attorney general for the Office of Legal Counsel. And he and his team -- and he's got a strong, able team -- have been really at the forefront of the drafting and negotiation.

SEN. WARNER: Around the clock, seven days a week.

ATTY GEN. GONZALES: I'm also here with Kyle Sampson, my chief of staff, and Will Moschella, who is my legislative director, as well as Tasia Scolinos -- I don't know if she's still here -- who is head of my Public Affairs Office.

SEN. WARNER: (Inaudible.) That's true.

ATTY GEN. GONZALES: Thank you, Mr. Chairman.

SEN. WARNER: Thank you very much.

And Secretary England.

MR. ENGLAND: Who's been working all the hard work every day and literally eery night and every weekend is Mr. Dan Dell'Orto, who has been working with all the folks in the Department of Justice but also all the people in the Department of Defense.

I do want to comment, Mr. Chairman, that we have had the general counsels from all of our services. We've had the JAGs. We've had our service chiefs. We've had our service secretaries. We've had staff within the department, the

General Counsel's Office. And Mr. Dan Dell'Orto has been coordinating all of that, along with -- by the way, all of our combatant commanders have been involved in all this. So we have been fully vetting and coordinating all these discussions, all these iterations as we have gone along. And Mr. Dan Dell'Orto's been doing a wonderful job in the Department of Defense, and I do thank him and his team for that great effort.

SEN. WARNER: Thank you very much. And we thank you, recognizing that you're not a lawyer, but you've done your very best and think you've held your own quite well.

MR. ENGLAND: Thank you.

SEN. WARNER: Not too late to get that degree. (Laughter.)

MR. ENGLAND: It's far too late, Mr. Chair. (Chuckles.)

SEN. WARNER: Well, you've got a little extra time. (Laughter.)

Senator Byrd came to the United States Senate and was a senator and went to night law school for a number of years and got his law degree.

Thank you very much. The hearing is now concluded, and we shall have further hearings of this committee on this important subject. (Strikes gavel.)

Thank you, guys.

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